TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 842.

BABE BEARD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED NOVEMBER 13, 1894.

(15,726.)

(15,726.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 842.

BABE BEARD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	2	1
Order to file indictment	4	2
Arraignment and plea	4	2
Order allowing witnesses for defendant at public expense	4	2
Order continuing cause to next term and setting day for hearing	5	2
Order allowing additional witness for defendant at public expense	5	3
Order setting cause down for trial	5	3
Order for attachment for George Crowder	5	3
Order beginning trial	6	3
Order continuing trial	7	4
Order concluding trial	7	4
Verdict	8	4
Order filing motion for new trial	8	5
Order reserving motion for new trial, &c	9	5
Order overruling motion for new trial	9	5
Judgment and sentence	9	6
Order allowing bill of exceptions	11	6
Order filing assignment of errors	11	6

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 2, 1895.

	Original.	Print.
	12	6
Bill of exceptions	12	7
Evidence for the United States	12	7
Testimony of John Jones	15	8
Mrs. Margaret Pounds	17	9
Ed. Jones	18	10
Bert Coffee	19	10
Dr. Howard Hunt	19	10
Evidence for defendant	20	10
Testimony of Joe Hicks	21	11
George Crowder	22	11
Mrs. Scott	23	11
Robert Young	24	11
John Winters	25	12
Wm. Byers	26	12
Babe Beard (defendant)	31	14
L. Coffee	31	15
John Smith	32	15
Carl Martin	33	15
Evidence for the United States	33	15
Testimony of Joe Coffee	35	16
Charge of court	69	37
Exceptions to charge	75	43
Defendant's requests for instructions	82	—
Opinion on motion for new trial (omitted in printing)	111	47
Judge's certificate to bill of exceptions	112	48
Assignment of errors	126	59
Petition for writ of error	130	61
Writ of error	131	62
Bond	134	64
Citation (copy)	135	64
Clerk's certificate	136	65
Stipulation to omit part of record in printing		

1 In the Circuit Court of the United States in and for the Western District of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, in the case of—

UNITED STATES
vs.
BABE BEARD.

Indicted for murder and convicted of manslaughter.

2 *Indictment.*

UNITED STATES OF AMERICA,
Western District of Arkansas.

In the Circuit Court, Feb. Term, A. D. 1894.

UNITED STATES
vs.
BABE BEARD. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that Babe Beard, a white man and not an Indian, on the 16 day of Dec., A. D. 1893, at the Choctaw nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms in and upon the body of one Will Jones, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Babe Beard, with a certain gun used as a bludgeon, which said gun he, the said Babe Beard, in hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did strike to, against, and upon the said Will Jones, and that the said Babe Beard, with the gun aforesaid, then and there by force of the gun aforesaid by the said Babe Beard used as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him, the said Will Jones, in and upon the head and body of him, the said Will Jones, giving to him, the said

3 Will Jones, then and there, with the gun aforefaid, by the said Babe Beard, in and upon the head and body of him, the said Will Jones, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Will Jones, then and there instantly died; and so the jurors aforesaid upon their oath aforesaid do say that the said Babe Beard him, the said Will Jones, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in

such cases made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 84. United States *vs.* Babe Beard. Murder. A true bill. Ewing Rowlett, foreman. Witnesses: John Jones, Cameron, I. T.; Ed. Jones, Cameron, I. T.; Margaret Pounds, Cameron, I. T.; I. B. Coffee, Cameron, I. T.; J. F. Jones, Cameron, I. T.; Dr. Hunt, Cameron, I. T. Filed in open court February 14, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

4 In the Circuit Court of the United States for the Western District of Arkansas, February Term, 1894.

WEDNESDAY MORNING, 8½ O'CLOCK, *Feb.* 14, 1894.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

On this day come the grand jury in and for the western district of Arkansas and through their foreman return into court indictment No. 84, which was by the court ordered to be filed.

UNITED STATES *vs.* BABE BEARD. } Indictment for Murder. No. 84.

MONDAY, *Feb.* 26, 1894.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, and, having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States. Said application coming on to be heard, and the court, being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring
5 the testimony of Virgil Langston, M. C. Martin, Joe Hicks, M. C. Franklin, John Winters, W. A. Biars, Sam. Roup, and Geo. Crowder in behalf of said defendant be paid by the United States, and that a subpœna be issued for them, returnable March 12, 1894.

(Caption omitted.)

WEDNESDAY, *March* 7, 1894.

On this day, by agreement of parties, it is ordered by the court that this cause be, and the same is hereby, continued to the next term of this court and set down for trial May 24, 1894.

May Term, 1894.

(Caption omitted.)

FRIDAY, *May* 18, 1894.

On this day come the said defendant, by his attorney, and files an additional application for witnesses in his behalf at the expense of the United States. Said application coming on to be heard, and the court, being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of John Smith in behalf of said defendant be paid by the United States, and that a subpœna be issued for him, returnable May 24, 1894.

(Caption omitted.)

WEDNESDAY, *May* 23, 1894.

Ordered by the court that this cause be, and the same is hereby, set down for trial June 20th, 1894.

(Caption omitted.)

WEDNESDAY, *June* 21, 1894.

Ordered by the court that an attachment issue for George Crowder, returnable forthwith, to show cause why he should
6 not be punished for his contempt in failing to appear as a witness in this cause when duly summoned thereto.

(Caption omitted.)

FRIDAY, *June* 22, 1894.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendant, in his own proper person and by his attorneys, Messrs. Rogers & Oglesby, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore, and the said defendant having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined; whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit, Wm. A. Brumley, Chas. F. Covington, Sanders L. Hogan, John N. Maple, Geo. T. Mullen, Perry F. Parker, Christopher C. Poynter, Hugh Proctor, Elias Russell, Wm. D. Swift, Andrew A. Tuggle, John Tucker, twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing a statement of the case by counsel

for both plaintiff and defendant and portion of the evidence, and there not being time to further progress in the trial of this
7 cause, said jury was put in charge of a sworn bailiff of this court; and it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

(Caption omitted.)

FRIDAY, *June* 22, 1894.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendant, in his own proper person and by his attorneys, Messrs. Rogers & Oglesby, and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit, Wm. A. Brumley, Chas. F. Covington, Sanders L. Hogan, John N. Maple, Geo. T. Mullen, Perry F. Parker, Christopher C. Poynter, Hugh Proctor, Elias Russell, Wm. D. Swift, Andrew A. Tuggle, John Tucker, who took their seats in the jury-box, and after hearing the remainder of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

(Caption omitted.)

SATURDAY, *June* 23, 1894.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendant, in his own proper person and by his attorneys, Messrs. Rogers & Oglesby, and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit, Wm. A. Brumley, Chas. F. Covington, Sanders L. Hogan, John N. Maple, Geo. T. Mullen, Perry F. Parker, Christopher C. Poynter, Hugh Proctor, Elias Russell, Wm. D. Swift,
8 Andrew A. Tuggle, John Tucker, who took their seats in the jury-box, and after hearing the remainder of the argument of counsel and receiving the instructions of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict, counsel for the defendant having filed exceptions to the charge of the court in the presence of the jury.

Whereupon the defendant was by order of court committed to the custody of the marshal.

(Caption omitted.)

MONDAY, *June* 25, 1894.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, Messrs. Rogers & Oglesby, and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit, Wm. A. Brumley, Chas. F. Covington, Sanders L.

Hogan, John N. Maple, Geo. T. Mullen, Perry F. Parker, Christopher C. Poynter, Hugh Proctor, Elias Russell, Wm. D. Swift, Andrew A. Tuggle, John Tucker, who returned into court the following verdict, to wit:

"We, the jury, find the defendant, Babe Beard, guilty of manslaughter, as charged in the within indictment.

(Signed) GEORGE T. MULLEN, *Foreman.*"

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

(Caption omitted.)

THURSDAY, *July* 12, 1894.

9 On this day come the said defendant, by his attorneys, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

(Caption omitted.)

SATURDAY, *August* 4, 1894.

On this day it is ordered that the motion for a new trial heretofore filed, argued, and submitted and taken under advisement and now remaining undisposed of and the decision thereupon be, and the same is, reserved for further consideration by the court, and continued until the next term of this court without prejudice, and on motion it is further ordered and adjudged that, in event said motion shall hereafter be overruled, *that* the defendant be, and is hereby, allowed sixty days within which to prepare, tender, and file his bill of exceptions in the above-entitled cause.

(Caption omitted.)

August term, 1894.

MONDAY, *Aug.* 20, 1894.

On this day come on to be heard the motion heretofore filed by the said defendant to set aside the verdict of the jury and for a new trial in this cause—the defendant being present in custody of the marshal and by his attorneys—and the court being well and sufficiently advised in the premises doth overrule said motion.

(Caption omitted.)

TUESDAY, *August* 21, 1894.

On motion of Jas. F. Read, Esq., attorney for the western district of Arkansas, the said defendant, Babe Beard, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty of manslaughter, heretofore returned against him by the jury in this cause on the 25th

10 day of June, 1894, should not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Babe Beard, for his felony aforesaid, be imprisoned in the Kings county penitentiary, situated at Brooklyn, in the State of New York, for the term and period of eight (8) years from this date, and that he pay to the United States of America a fine of $500.00, together with all its costs in and about this prosecution laid out and expended, and that it have execution therefor.

It is further considered that the marshal of the western district of Arkansas, in whose custody the said Babe Beard is now here committed, receive and safely keep and convey the body of the said Babe Beard hence to said penitentiary, in the State of New York, without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said Babe Beard in jail in execution of the sentence aforesaid and in conformity with the same for the full period of the time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court with a full and true account of the execution of the same.

11 (Caption omitted.)

TUESDAY, *Sept.* 18, 1894.

On this day come the said defendant, by his attorneys, Messrs. Rogers & Oglesby, and tenders his bill of exceptions and asks that the same be signed and made a part of the record in this cause; which is accordingly done.

(Caption omitted.)

SATURDAY, *Sept.* 29, 1894.

On this day come the said defendant, by his attorneys, Messrs. Rogers & Oglesby, and files his assignment of errors.

12 In the Circuit Court of the United States within and for the Western District of Arkansas, May Term, 1894.

THE UNITED STATES *vs.* BABE BEARD. } Charged with Murder.

Be it remembered that upon the trial of the above-stated cause the following proceedings were had: It was established upon the part of the Government and conceded by the defendant that he is a white man, that the deceased was a white man, that the deceased died the 18th of December, 1893, from the effects of a blow given him the 16th of Dec., 1893, by the defendant with a gun used as a bludgeon, the deceased being struck on the head by the defendant with the said gun, and that the difficulty in which deceased was struck and the death of the deceased occurred in the Choctaw nation of the Indian Territory.

The Government then introduced as a witness JOHN JONES, who, being first duly sworn, testified as follows:

That he is 19 years old, brother of the deceased and of Ed. Jones; that their father died many years ago and their mother about three years ago. At the death of their mother, their stepfather being unable to take care of them and provide for them, they were placed among their relatives, Ed. Jones going to the home of defendant to be cared for by him. Their mother at the time of her death owned some cattle, which was divided among the children, and one cow turned over to the defendant for Ed. Jones, who at this time was eight or nine years old and small for his age. Ed. lived with defendant until November, 1893, when he left. On the morning of
13 the 16th of December the deceased, Ed. Jones, and himself went to defendant's house to get a cow belonging to Ed. Jones, witness taking with him a shotgun. The defendant refused to let them take the cow and made them leave his premises and told them not to come back upon his premises any more; that if they desired to get the cow to resort to lawful means to do so; if Ed. was entitled to her he could get her by law, and that he would abide by the law, and if they came again after the cow to come with an officer. The defendant was on his porch and had a gun in his hand when talking to us. When he first came out the first thing he said was, "What in the hell are you doing here?" We all left and that afternoon we went back to defendant's house again to get the cow. Ed. Jones went into the lot and drove the calf out into the field. Defendant's wife, he not being at home, stopped us and drove the calf back into the lot. About this time the defendant came into his yard and orchard, we being in his field, and ordered us to leave his premises and let the cow alone. We did not go. The deceased, who was seven or eight steps from the orchard fence, which was 3 or 3½ feet high, at which defendant was standing, went to the fence and stopped, putting his left foot in the crack of the fence and one of his hands—the left, I think—on the fence, and was talking to the defendant. About this time defendant's wife, who was some distance off, slapped Ed. Jones, and the deceased turned his head in that direction when defendant struck him with a gun which he had in his hand and deceased fell. Defendant immediately struck me, but did not knock me down. He immediately jumped over the fence, examined the pockets of deceased, first his coat, then his hip, then his trousers pocket, and got a pistol from the last-named pocket and immediately turned and asked me if I had one. I told him I did not. The defendant did not try to shoot either of us, nor did he try to strike either after getting over the fence, but could have done so if he had desired. The deceased after being struck tried
14 to get him to let the pistol alone, and after defendant took it tried to get him to give it back, but defendant refused to do so, saying he would send it to him. While deceased was standing at the fence he had his left hand on fence and was picking his teeth with left hand, but don't know where his hands were at the time he was struck, but think they were in that position. Deceased was doing nothing and was not saying anything to defendant when

struck. Deceased had been at fence for some little time. Did not know what either of them said after deceased got to the fence. Deceased was left-handed and the pistol was taken from his left trousers pocket. After the difficulty was over the *the* pistol — taken from the deceased, and after defendant found I had none something was said about his gun not being loaded and he said it was and snapped it and it did not fire. He then loaded it from the magazine, being a Winchester rifle. Cartridges of the Winchester gun are carried in the magazine and is loaded by simply moving the guard of the gun. The defendant fired his gun in the air, saying, "You see it is loaded." The defendant usually carried his gun when he went to Cameron. He was in the habit of carrying his gun about with him. The pistol taken from the deceased's pocket was a 38-calibre, double-action, five-shooting pistol. Do not know whether it was loaded or not. The deceased was two years older than myself. He was about the same height*h* as defendant and weighed about 140 lbs. I think the defendant weighed 150 or 160 lbs. The deceased was left-handed.

15 Mrs. MARGARET POUNDS, being duly sworn in behalf of the Government, testified as follows:

Lived in a few hundred yards of defendant, on his place; saw the deceased and his brothers, John and Ed., come to defendant's premises 16th Dec. last, and Ed. went into the lot and drove out of the lot into the field a calf. Defendant's wife came out and stopped them and drove the calf back towards the lot. About this time defendant came from his yard to near where the deceased and his brothers were and stopped at the orchard fence. The orchard and *and* the yard are together and the place at which he stopped was about 50 or 60 yards from his house. The defendant then called me, stating he wanted me to come and hear what he had to say to those boys. I went to where they were and the defendant told them to go away from his premises and let the cow alone. At this time the deceased was some seven or eight steps from the orchard fence at which defendant was standing. Defendant's wife and Ed. Jones were several steps off south of them. Defendant and deceased were talking when the deceased started in a brisk walk towards defendant, having at the time his left hand somewhere near about his left trousers pocket. He went straight to the fence and stopped and was there a few minutes—about five. Did not hear anything said by either of them after he got there. After deceased's getting to the fence Mrs. Beard slapped Ed. Jones, and deceased turned to look in that direction, when defendant struck him across the head with the gun and knocked deceased down. John Jones, who was somewhere behind his brother, stepped two or three steps in that direction when defendant struck him. Defendant immediately jumped over the fence, stooped down and took a pistol from the pocket of the deceased, and said to me, "Here it is," or something like that. He then asked John if he had a pistol. John told

16 him he did not. Deceased wanted the defendant to give him back the pistol; defendant told him he would not, but would

send it to him. Defendant did not attempt to shoot either the deceased or John Jones or to strike them any more, although he could have done so if he wished to do it. He fired his gun off in the air after the difficulty was over. John and myself then carried deceased to my house. Defendant asked me if a doctor had been sent for, saying, if not, he would get one.

At some time while deceased was at the fence he was picking his teeth with one of his hands. He was at the fence some few minutes before he was struck. Do not know where his hands were at the time he was struck; did not see deceased do anything to defendant after he got to the fence. Defendant's wife caught the gun after second blow and stopped him. Some time after I had been examined before commissioner defendant came to my house and told me he did not want me to keep back anything at trial, and also told me I was mistaken about his wife catching the gun and as to the amount of time that Jones, the deceased, was at the fence.

17 ED. JONES, being duly sworn, testified on behalf of the Government as follows:

Went with my brothers Will. and John to defendant's house the morning of the 16th of Dec. last to get a cow that belonged to me. Defendant drove us away and told us not to come back and that we could not get the cow except by law; that if the law said it was mine he would pay the cost and let me have her, and not to come back for her unless I came with an officer. When we went after the cow that morning the defendant came out of his house with a gun. We went back that afternoon to get the cow, and I went and drove the calf out of defendant's lot into his field, when his wife stopped me and drove the calf back. About this time the defendant came to near where we were and told us to go away from his premises and let the cow alone. We did not go. The deceased at this time was some few steps from the fence at which defendant was standing. I was sough of them, near defendant's wife. Deceased walked to the fence where defendant was and stopped a little while. While there defendant's wife slapped me. When deceased turned his head to look in that direction defendant struck him with the gun. All that I saw deceased do was that he was simply standing at the fence; don't know where his hands were and don't know what was said by either of them when he went to the fence or after he got there. I was only a few feet away from them at this time—say, 10 or 12. After deceased got to the fence he stood there awhile, with one of his feet on the fence, and he was picking his teeth with a splinter; don't know whether he was standing that way when struck; did not know that deceased had a pistol at that time. After knocking deceased down he jumped over the fence and took pistol from deceased's pocket. Immediately after striking deceased he struck John; never tried to strike or shoot either of them after he got over the fence.

18 BERT COFFEE, being duly sworn, testified on behalf of the Government as follows:

Went to defendant's house after hearing of the difficulty, and said, "Hello, Babe!" and he said, "By God, did you come down after that cow?" I replied, "No; I come down to see about those boys you knocked in the head," and he said, "There is one of them laid out down yonder." I said, "You ought to be ashamed; ar-n't you ashamed to knock a lot of boys in the head?" He said, "No." I said, "Don't you know the law will handle you for it?" and he said, "No; if I had killed them all I would come clear." Said he would come clear if he killed them all. He said the boys came down there that morning for the cow and he told them not to come back any more.

19 Dr. HOWARD HUNT, being duly sworn, testified on behalf of the Government as follows:

Am a physician. Was called to see deceased 16th of Dec. last, soon after he was hurt; found him in a serious condition. He died from the effects of a wound given by defendant. The wound was across his head, rather on the right side, and the skull was crushed by the blow. Saw the defendant soon after dressing deceased's wound and told him that deceased's condition was serious, and that I was sorry the occurrence had happened, and suggested to the defendant that perhaps he had better get out of the way. He replied that he was sorry that it had happened, but that what he did he did in self-defense, and that he would not go away. He seemed a little offended at my suggestion and said I could not scare him; that he was perfectly justifiable in what he did. He did not give me any of the details.

Have known the defendant four or five years and am well acquainted in the neighborhood in which he lives and know his general reputation, and it is that of a peaceable, law-abiding man.

This was all the testimony offered in chief by the Government.

20 The defendant then introduced JOE HICKS, who, being duly sworn, testified as follows:

Am acquainted with the defendant and knew Will Jones in his lifetime. Am not related to either one of them. While picking cotton in the winter of 1893, some time in November, had a conversation with Will Jones about Ed. The conversation with Will came up about Ed. Jones living with defendant and about a cow that Ed. Jones claimed. The deceased then said he would have the cow or kill the defendant. I never saw the defendant before the difficulty and did not communicate these threats to him.

Worked some for Mr. Beard last year, cleared up some land for him, which he paid me for in hogs instead of money.

21 GEORGE CROWDER testified on behalf of the defendant as follows:

Knew the deceased in his lifetime; not related to either him or the defendant; was at Mrs. Scott's, an aunt of the deceased, some time in December, 1893, before deceased was killed. The deceased and John Jones were there. A conversation came up about the cow in controversy, and he said he was going to Beard's for the cow, and said, "I am going to get a cow or kill Babe Beard." I knew there was some misunderstanding about the cow and advised him not to go to him, but to get some disinterested party to go to see if he could not settle the matter and if he could not get the cow on reasonable terms. Am not related to any of the parties.

22 Mrs. SCOTT, witness on behalf of the defendant, testified as follows:

The deceased and his brothers are my nephews and defendant's wife my sister. Was at Ft. Smith, Ark., with deceased Wednesday before the difficulty on Saturday. Deceased bought a box of cartridges at that time at Ft. Smith, saying he might need them. As we went on home from Ft. Smith deceased told his brother John to meet him at Joe Coffee's Friday morning and they would go and get the cow. I remember that Mr. Crowder was at my house a short time before the difficulty, and that deceased and John Jones were there at the same time; did not hear any conversation between them; heard deceased say that defendant was not treating his brother Ed. right and he was going to have him away from defendant or he (deceased) would do him up.

23 ROBERT YOUNG testified on behalf of the defendant as follows:

Knew defendant and knew deceased; not related to either; was at John Winters' on Friday before the difficulty occurred Saturday; saw the deceased with a pistol. Conversation came up about a cow at Mr. Beard's, when the deceased said he expected to have trouble with Mr. Beard, but he said he aimed to have the cow at the risk of his life.

24 JOHN WINTERS, being sworn, testified on behalf of the defendant as follows:

Am acquainted with both defendant and deceased; not related to either of them. Deceased was at my place the day before the difficulty. I asked him where he was going. Said he had started to Babe Beard's after his cow; said, "I am looking to get into bad trouble," to which I replied, "I would not go, then," and he said, "Yes; I am going over there and have one of those cows or kill Babe Beard." I told Mr. Byers of these threats and told him to communicate them to Beard if he saw him. I met the defendant myself at Cameron the next evening, which was Saturday, and asked him if he had seen Byers, and he said, Yes. I then told defendant of the threats deceased had made.

25 WILLIAM BYERS, being duly sworn, testified on behalf of the defendant as follows:

Received a message for defendant from John Winters; met defendant near the railroad crossing at Cameron Saturday evening before the difficulty and told him that Mr. John Winters had stated to me that he heard the deceased say that he was going to have the cow at Beard's or kill Beard, and for me to let him know what deceased said. When I met the defendant I told him what Winters had stated to me.

26 The defendant, BABE BEARD, being duly sworn, testified as follows:

When the mother of Wm. Jones, who was the sister of my wife, died she left a number of children unable to provide for themselves and with no means of support. They were divided up among her relatives, I taking Ed. At her death she had several head of cattle and it was understood that a yearling would go with the boy Ed. When requested to take Ed. I would not agree to do so, except upon the conditions that I should have exclusive control over him and the right to deal with him and the cow as if he were one of my own children and the cow my property, distinctly telling Ed.'s stepfather that if I was to be troubled with Ed. until large enough to be of service and then have him taken away that I would have nothing to do with him. It was then agreed that I should take Ed. and have the yearling that went with him and the right to keep Ed. until grown, and to deal with him as one of my own children, and the cow as my own. Under this agreement I took Ed. and a few days afterwards got the yearling. This yearling belonged to Ed. Jones. At the time Ed. came to my house he was small, in bad condition physically, was unable to do much work, and was poorly clad. I took him and treated him as I did one of my children, giving him suitable clothing, sending him to school, and in every way treated him kindly. He was indolent and had to be reproved about this and was disobedient at times and I chastised him about that as I would one of my children. In November, before the difficulty with Wm. Jones in December, Ed. was decoyed off, as I believe, by William Jones. He had no occasion for leaving. He had about arrived at an age when he could be of some service to me and had not been of any prior to that time.

According to the agreement had when I took possession of Ed., and as he had left without any cause, and after I had been to
27 the expense and trouble of caring for him for three years, I believed I had the right to retain possession of the cow, at least, until compensated for my trouble. I, however, did say that if any responsible person would take it I would turn over to them a yearling equal in value to the one he brought with him when he came to my house. I was, however, unwilling to turn it over to Joe Coffee, believing that if I did Ed. would not get any benefit from it. On the morning of the day on which the difficulty occurred Ed. Jones, John Jones, and William Jones came to my house, John Jones bringing with him a shot-gun, and without asking permission

sent Ed. into the field for the cow. Seeing him with a gun, I took my gun, went out on the porch and forbade them taking the cow, telling them they had no right to her and for them to leave the premises and not to come back on it again to get the cow. I stated to them that if they were entitled to her under the law to proceed in a lawful way, and if the law gave her to them I would turn her over and pay all the costs, but not to return to get her without an officer. They left, and that afternoon I went to Cameron, which was my post office and trading place. In going to Cameron, which was five or six miles distant, I go through a creek bottom and was in the habit of carrying my gun. I carried it with me that day, which was not unusual, both because it was my habit to do so and because I did not know but what I might meet up with them, and as John Jones was armed with a gun, thought it prudent to have mine. After getting to Cameron met Mr. William Byers, who informed me that he had seen Mr. John Winters, and that John Winters had stated to him that he heard William Jones making threats against my life, stating in substance that he intended to have the cow or that he would kill me, and warned me to be on my guard.

28 A short time afterwards, before leaving Cameron, I saw Mr. John Winters, and he communicated to me the threats that Wm. Jones had made, to either get the cow or kill me, and that he was armed. After this I returned home. Just before getting there I saw the same three Jones boys on ahead of me; they turned out of the road a short distance this side of my house, and when I got to my yard I saw them in the field, one of them driving away a *calf* that had been taken out of my lot. My wife was up there with them, endeavoring to drive the calf back. I dismounted, took my gun with me, and went through my yard up to near where they were, but did not go over in the field, remaining in the orchard. The orchard is in the same enclosure with my yard and is about 50 or 60 steps from my house. There was a low fence between Wm. Jones and myself. Seeing Mrs. Pounds a short distance off, I called to her and asked her to come there and hear what I had to say to them. She came, and I told them to leave my premises. They did not do so, but Will Jones, who was at that time some 10 or 15 yards away from the fence, turned and started towards me in an angry manner and in a brisk walk, with his left hand in his left-trouser's pocket. When he got within five or six steps I told him to stop, but he did not do so. As he approached nearer I asked him, "What are you going to do?" To which he replied, "Damn you, I will show you," at the same time making a movement with his left hand as if to draw a pistol from his pocket. Believing from his demonstrations just mentioned that he intended to shoot me, I struck him over the head with my gun to prevent him killing me. As soon as I struck him his brother John, who was a few steps behind him, started towards me, with his hands in his pocket. Believing that he intended to take part in the difficulty and was also armed, I struck him, and he stopped. I then at once jumped over the fence,

29 caught Will Jones by the lapel of the coat, turned him rather to one side, and pulled his left hand out of his pocket. He

had a pistol, which I found in his pocket, grasped in his left hand, and I pulled his pistol and his left hand out together. My purpose in doing this was to disarm him, to prevent him from shooting me, as I did not know how badly he was hurt. My gun was loaded, having ten cartridges in the magazine. I could have shot him, but did not want to kill him, believing that I could knock him down with the gun and disarm him, and protect myself without shooting him. After getting his pistol John Jones said something to me about killing him, to which I replied that I had not killed him and did not try to do so, for if I had I could have shot him. He said my gun was not loaded; thereupon I shot the gun in the air to show him that it was loaded. Mrs. Pounds and John Jones then took Will to her house. I took my wife home and then went to Mrs. Pounds' to see if a doctor had been sent for, for the purpose of getting one if one had not been procured. Dr. Howard Hunt came and examined the wound and said it was quite serious, and rather advised me to get out of the way. I declined to do so, stating to him that all I did was in self-defense. A short while after the difficulty Bert Coffee, an uncle of deceased, came to my house, but I did not say to him, "Have you come after that cow?" nor that he would find one of them laid out there, and that I would come clear if I had killed them all."

The deceased did not stop at the fence and put one of his feet in a crack of the fence and rest one of his hands on the top of the fence, nor did we have any conversation, except that I told him to stop and asked him what he was coming for, when he gave the reply above mentioned. When he made a motion as if to
30 draw his pistol he rather turned his right side to me. I had the breech in my right hand and my left hand forward upon the barrel, with the muzzle up a little above my head, and struck at him in that way.

I weigh 155 lbs. The deceased was about my height and there was not much difference in our weight. My wife is the aunt of the deceased and his brothers. I am 35 years old; deceased was between 20 and 21 years old. I am right-handed; the deceased was left-handed. I have known him a long while and have often seen him shoot a pistol, and I knew that he was left-handed and knew that he used his left hand in shooting a pistol.

31 I. COFFEE, being duly sworn, testified on behalf of the defendant as follows:

Defendant's wife is my daughter and the deceased is my grandson. Lived in the neighborhood of the defendant 12 or 14 years and know his general reputation in that neighborhood. It is that of a peaceable, law-abiding man. Was frequently at defendant's house, and his treatment of Ed. Jones while he lived with defendant was good; he was well clothed and apparently well cared for. The defendant stated that he was always willing to turn over a yearling equal in value to the one Ed. Jones brought to his place to myself, Bert Coffee, or any responsible person who would take charge of it

for Ed. Did not hear him say anything about turning over the cow and calf to him.

JOHN SMITH, being duly sworn, testified on behalf of the defendant as follows:

Lived in the neighborhood of the defendant 15 or 20 years and have known defendant 8 or 10 years; know his general reputation for peace and violence in the neighborhood in which he lived; his reputation was that of a peaceable, law-abiding citizen.

I bought the cow in controversy from defendant and started home with her, the defendant going with me, carrying his gun; heard him make no threats against any one. Something was said about Joe Coffee trying to take the cow away from him. Defendant said that Coffee had been making threats and would probably try to run over him, but that he did not aim to hurt any one with
32 the gun if they would let him alone and not bother him. Joe Coffee met the defendant on the road; stopped him by catching hold of the bridle reins of the horse he was riding, and told Ed. Jones to take the cow and put her in the pen. Joe Coffee and defendant then got into a fight and I assisted in separating them.

CARL MARTIN, being duly sworn, testified as follows:

Have known the defendant about three years; he is my stepmother's brother; is not related to me, but is the brother of my stepmother. Know the general reputation of the defendant in the neighborhood in which he lives; it is that of a peaceable, law-abiding, and good citizen. Lived with the defendant about three years ago, when Ed. Jones first came to live at defendant's house. Ed. at that time was very small for his age and poorly clothed and from his general appearance was in a bad condition. The defendant treated him as one of his own children and took proper care of him. Ed. did some little work in the crop; he was not large enough to do much work; he was not very industrious when he came, and did not incline to work.

This was all the testimony introduced by the defendant in chief.

33 JOE COFFEE was then introduced on behalf of the Government and, being duly sworn, testified as follows:

Knew Ed. Jones when he lived with defendant; saw him doing farm-work on the farm; saw him hoeing cotton; do not know that I ever saw him plow. The defendant sold the cow claimed by Ed. Jones. Saw the defendant with Smith, driving the cow along the road, and I spoke to him and asked him what made him sell the cow, or something like that, to which he replied that it was all right. We then had some words about the cow and got into a fight, in which the defendant presented his gun at me. The cow was one that my brother gave to Ed. when the cattle were divided among the children.

The Government closed. This was all the testimony introduced in the case on either side.

After counsel for the Government and the defendant had argued the case before the jury the court charged the jury as follows:

34 *After counsel for the Government and the defendant had argued the case before the jury the court charged the jury, among other things, as follows:*

35 Now, what is this other crime? It is one of less grade than murder. The law sometimes names it as a crime that occupies a position midway between self-defense and murder. It is called manslaughter. It contemplates a state of case where a life has been destroyed under circumstances or in such a way as that there is not in it this distinguishing attribute of murder called malice aforethought. It is defined by the Revised Statutes of the United States, sec. 5341, as follows:

"Every person who, within any of the places or upon any of the waters described in section fifty-three hundred and thirty-nine, unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

Now, let us see what is meant by that definition. When we speak of manslaughter in a case like this we mean voluntary manslaughter. It means the willful and unlawful killing of another in such a way as to show that there is an absence from that killing of this element that I have defined to you as malice aforethought. If that element exists, of course, we cannot drop down from one condition to another and say that one exists when it does not exist. We must be governed by a state of case that is proven beyond a reasonable doubt; we must define that state of case accurately, concisely, and honestly.

Now, what things are necessary to be found here to make this crime of manslaughter? First, that it was done willfully, and, second, that it was done unlawfully. If it was done lawfully it would be no crime. If it is done lawfully it must be done under what is called the law of self-defense, because there is no right to kill any man, except it is done by the law. We must go, then, to the

36 law of self-defense for two or three reasons: First, because it has been invoked in this case as the ground upon which this case should rest, and, secondly, we are the better able to see what does exist by looking at all three of these conditions upon this principle of elimination that I have adverted to. If a killing is done where there is no malice aforethought, as I have defined it—if it is done where there is no case of self-defense, it is unlawful; if it is voluntarily done or done wilfully, as I have defined the expression willful, then it is necessarily a case where there is manslaughter. Now, in connection with the law of self-defense, I will give you some other propositions presently which will show you what sort of a case under the law will make manslaughter. The law contemplates when it

goes to admeasure this crime that it is one that grows out of a condition where upon sudden quarrel two persons meet and engage in an affray or meet and fight and one of them kills the other; this is voluntary manslaughter. So the law says if they upon such occasion go out and fight in a field this is one continued act of passion. So, also, if a man provoked by any gross indignity, *and* immediately kills his aggressor, it is voluntary manslaughter and not excusable homicide. In this and such like cases the law, kindly appreciating the infirmities of human nature, extenuates the offense committed and hesitates to put on the same footing of guilt the cool, deliberate act and the result of hasty passion. This state of case means that the party who kills was at the time doing some act which the law considers sufficiently provocative in its character. That has to have such influence upon the mind of the party killed as that his mind becomes inflamed, and it contemplates that he acted under that inflamed mental condition rather than under a condition of deliberation that might result in death. The law attributes it to that mental condition rather than to the other, and with that care the
37 law tells us what these things are that we may take into account as so inflam-atory and provocative in their character as that we may consider them by way of reducing the grade of the crime. It tells us what we have a right to take into account in passing upon a case of that kind that will eliminate from the case that attribute known as malice aforethought. It does not mean the use of any words or the use of any threats to do acts of violence; it does not mean the commission of a simple trespass upon the property of another, because, as I will tell you presently from the law, the commission of a trespass cannot be taken into account even to mitigate a crime—I mean a simple trespass. There are certain forcible trespasses which do not give a party the right to kill and be excused in killing, yet they may be taken into account to mitigate the crime; but this will come more properly in connection with another branch of this subject. But a simple trespass upon the person or upon the property of another does not even mitigate the crime—does not even reduce the grade of it from murder to manslaughter. The law contemplates that this grade of crime is when it springs into existence, generally speaking, where there is some act of violence done the person, as—in an illustration given by the law—where two men are engaged in a common fight with their hands and fists and there is no previous purpose upon the part of either to use a deadly weapon, and in the course of the fight, being heated and excited, their minds inflamed by the blows received one from the other, and one suddenly, without any previous preparation, without any previous purpose to do so, seizes a deadly weapon and slays his adversary, the law says that is manslaughter. There are some things, such as insults to the family, outrages, or insults, where no actual physical violence has been received, where
38 the law would mitigate the crime if the killing take place immediately following the offer of such insult or such indignity; and it has been as the law for many ages that there are certain kinds of assaults, very slight in their character, which are so

humiliating, so degrading, and so insulting that if a man suddenly kills because he receives one of them the crime will be mitigated then. Mr. Blackstone says that if a man tweaks the nose of another, that is such an indignity, such a sign of contempt expressed by the man who does it, as that in such a case the law commiserates the condition of the party, and if he kills because of that, the crime would be reduced.

I will undertake now to tell you what self-defense is. As I have already told you, manslaughter is a crime that occupies a position midway between these other two conditions. It is not a case without crime, nor is it a case that has in it the attribute of murder. Now, the defendant in this case claims that there is no crime in the case; that he did nothing but what he had a right to do. If that is true, he is entitled to a verdict of acquittal at your hands, or, more properly speaking, unless one or the other of these conditions that are criminal is proven beyond a reasonable doubt, he is entitled to an acquittal at your hands. But to get this right of self-defense defined by going to my opinion or yours would be wrong. You are to go to the law and see when it says we can kill, and it is by that that we are to be governed; it is by that that you have sworn to try this case and determine it. If that right belongs to the defendant in his case, as shown by the circumstances and by this law that I am about to give you, then give it to him; but if the facts in this case do not show that he is entitled to it, you will not give it to him, but you will administer the law. You do administer it in either case. If he is entitled to it, you would administer the law by giving it to him; if he is not entitled to it,
39 you would be correctly administering the law by saying what crime he is guilty of and finding him guilty of it. Now, what is meant by and under what circumstances can we exercise this great right that belongs to us? It is a great right and it belongs to every citizen. It is sometimes called the law of necessity, because it grows out of the necessity of the case; because it grows out of a condition where no other means of protection to life can be exercised to prevent the infliction of great bodily harm upon the person who exercises this right. It is a just law; it is a proper law; it is a law that is as highly necessary for the protection of the rights of the citizens as is any principle of the law administered in a court; but it must be administered as it is. He, in other words, must stand upon it. If he is outside of it, he cannot ask for its protection, and if he is standing upon it he can stand and ask for his protection while standing upon it. Now, besides the propositions which really embrace the whole of it there are other things which enter into it, when we come to make an application of it, that are necessary to be noticed. You necessarily will want to know whether either of these propositions of the law of self-defense can be employed because a threat has been made against the life of the defendant, if you believe it has been made. You will want to know whether or not he had a right to assert this law of self-defense because these parties came upon his premises. You will want to know in this case how far the duty devolved upon him to

avoid the necessity of taking life—that is, whether or not he was called upon as he was situated to exercise all reasonable means at hand to avoid taking life before he did do it, or whether he could stand, situated as he was upon his own premises, and take life, provided the danger did exist, but that it was danger he could have avoided by the exercise of other means than those he resorted to. You must know all these propositions of law in order
40 that you may apply them correctly. Now, first, we will give you the two propositions of the law of self-defense: First, the law says, a man who is in the lawful pursuit of his business—that means he was doing what he had a right to do at the time—is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm. That is the first proposition. It embraces two things: First, he must be doing what he had a right to do. Then, he must have been attacked by another in a certain way—in such a way as that the circumstances attending that atttack would indicate a purpose upon the part of the party being made to take his life or to do him some great injury that might produce death or great violence upon his person, such as maiming or wounding him in a serious way. These are the first conditions that are required to be found, and if they are in existence he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, you will remember that this is a proposition that embraces a state of case where the danger is actual, where the danger is real, and that is the first thing you are to consider in this case, whether the proof shows in the case that that did exist whether an attack had been made by the deceased in this case, Will Jones, and under such circumstances as to indicate the purpose of Jones then and there to take the life of the defendant or to do him some great harm; whether the actions of Jones, under the circumstances at that time or in connection with that act, were of a character to indicate that that part of the first proposition of this law of self-defense exists. Under this proposition it must exist before he could take the
41 life of Jones. If it did not exist under this proposition or under the second proposition that I will give you presently, where it may exist apparently, then the defendant had no right to take the life of Will Jones. Now, let us go over it again that we may make no mistake.

A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, upon that proposition we first ascertain from this evidence whether Will Jones was really or apparently about to execute a deadly purpose, and that it was so immediate, really or apparently so immediate, so then and there

existing that the defendant could not avoid a deadly result that might follow from the act of Jones except by doing as he did do—by taking his life. But let me give you in connection with this the other proposition, which contemplates a state of apparent danger. It is a state of case where the danger to life or of great bodily harm may not be actual; it may not be real; it may only apparently exist. You naturally inquire in this connection what is meant by that proposition. Does it mean that if he thinks the danger is there, and acts upon it, that he can slay his fellow-man and be excused in doing it? How dangerous that rule would be to human life, how uncertain would be the protecting power of the law if that was the case; but it is not. It does not mean any such thing as that. It does not mean that a man may have a conception of what is called wild justice and take life upon every pretext
42 and upon every occasion, and then say because he thought there was no danger that he is to be protected under this law of self-defense. The law of self-defense, as I have already said to you, is like all the other principles of the law. Its purpose is to protect the innocent citizen, and if that interpretation was the one to be applied to the doctrine of apparent danger, then there is no safety in the law, there is no protection in it, there is no security in it, and human life is at the mercy of every man whose conceptions of right and wrong may be of the crudest and most imperfect, and even of the most wicked, character; but it does not mean that, and I will undertake to explain what it does mean, so that you may make an intelligent application of it, and if that state of case exists in this case, as shown by the testimony, then the defendant would be entitled to this branch of the law, as well as that state of case which the law declares as one where the danger is real, where it is actual, where it then and there exists. Now, what is it? When from the nature of the attack there is reasonable grounds to believe that there is a design to destroy his life or to commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. Now, you may be misled by that without some other explanation is given, and let me explain it to you in the language of a most eminent court, in my judgment—at least, a most eminent judge—who declared what was meant by this doctrine of apparent danger when he said that "no conception of bare fear could give a party the right to slay, and a man could not be killed upon a state of bare fear, but that there must be something else existing than that." Judge Simrall, of the supreme court of Mississippi, in the case of John Evans *v.* State, 44 Miss., 762, said:

"To shoot down another on sight and who at the time is
43 making no hostile demonstration dangerous to life or limb, and especially if not prepared and armed so to do, is in law murder. It is murder because the law tolerates no justification and accepts no excuse for the destruction of human life on the plea of self-defense except that the death of the adversary was necessary or apparently so to save his own life or his person from great bodily injury, and there shall be imminent danger of such design being

accomplished. The danger to life or of great personal injury must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life. When we use the term 'apparent'—'apparent danger'—we mean such overt actual demonstration by conduct and acts of a design to take life or to do some great personal injury as would make the killing apparently necessary to self-preservation."

That is to say, the party who is killed at the time of the killing must be doing some act which, from its nature and the way he is doing it, would lead a reasonable person situated as was the defendant, occupying his position, to the conclusion that the danger was real, was actual. It must grow out of some overt act of apparent violence upon the part of the one slain. No bare conception that danger exists will excuse upon the ground of apparent danger; no conception in the mind of a party that there is danger existing there; and under both of these propositions it must be danger that is not created by his own wrongful conduct, because under both propositions he must have been in the right—measurably in the right. He must be doing that which he had a right to do, the law says.

Again, in the case of William Scott, a case in Alabama, it was held that—

"The belief that a person designs to kill me will not prevent my killing him from being murder unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately."

A man may have a deadly weapon upon his person and yet not have a design to commit a deadly act. In the language of this law:

"It is not that he has means at hand by having a deadly weapon, but that by some act or demonstration he indicates at the time of the killing a present intent to carry out such purpose, thereby inducing a reasonable belief upon the part of the slayer that it is necessary to deprive him of life to save his own."

It seems to me that this proposition, taken together with the general proposition that I have given you upon the doctrine of apparent danger, make it perfectly plain as to what state of case must exist before a man can claim the right to kill upon the ground of apparent danger. Now, to show the existence of this first proposition there must be real danger—danger to life or of great violence to the person—and that danger must have been created by the wrongful act of the party killed.

The party killed must have been doing some act, and the party killed must have been in the right himself at the time. Then if that condition exists—if this state of real or apparent danger exists—and the defendant could have avoided it by some other reasonable means at hand than by taking the life of the man he did kill, it was his duty to do so. That is the law; that is what it says; that is what we are to administer here—the best we can and nothing else but that. It says that he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own

life or to prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, the question comes up whether or not, situated as he was there, upon the place that was occupied by him, he was in possession of at the time he was called upon to avoid it if the danger existed, really or apparently. That is the first proposition to be found. If it does not exist at all you can stop right there, upon that part of the subject, because there was nothing upon which he could base the right to kill if that danger did not exist, really or apparently; but if it existed you naturally want to inquire at this point in the proceedings whether or not the defendant was called upon to take any reasonable means at hand to avoid
45 that danger before resorting to deadly violence, situated as he was, without seeking to adopt every reasonable means at hand, if this means were available. If these boys or young men, or whatever you may consider them, went down there, and they were there unlawfully—if they had no right to go there—you naturally inquire whether the defendant was placed in such a situation as that he could kill for that reason. Of course, he could not. He could not kill them because they were upon his place. If they had no manner of claim to this cow, if they took her as an act of larceny, if it was a larcenous act that they were seeking to execute and the defendant killed because of that, he would be guilty of a crime, because you will bear in mind that this law of self-defense is the great law of necessity that is placed in our hands to protect our lives against an act that may directly endanger these lives or against acts that may indirectly endanger them. Now, there are certain felonies, there are certain high crimes, that we can kill to prevent—not upon the ground that they are offenses against property, because we cannot kill to save property alone. If a man is stealing your horse and you kill him because he is stealing your horse, you are guilty of a crime. You would not be guilty of murder, because the law considers that is a provocative act that would reduce the grade of the killing to manslaughter; but it contemplated that you as citizens are not entrusted with any higher right than a court and jury, which cannot take a man's life for stealing a horse, and therefore the individual citizen has no right of that kind. And if these young men were there in the act of attempting the larceny of this cow and calf and the defendant killed because of that, because his mind was inflamed for the reason that they were seeking to do an act of that kind, that is manslaughter; that is all it is; there is
46 nothing else in it; that is considered so far provocative as that it reduces the grade of the crime to manslaughter and no farther. If they had no intent to commit a larceny; if it was a bare, naked trespass; if they were there under a claim of right to get this cow, though they may not have had any right to it, but in good faith they were exercising their claim of that kind, and Will Jones was killed by the defendant for that reason, that would be murder, because you cannot kill a man for bare trespass—you cannot take his life for a bare trespass—and say the act is mitigated. Nothing

of that character can be taken into account to mitigate the crime, and it is upon this principle that I have already given you that the law is a law that is designed by its very character to protect human life. A man commits burglary in a dwelling-house; the law considers that as an act that indirectly endangers life. The man who goes into it is very likely to kill if he has a chance, either to secure his booty or secure his escape, and therefore, when you catch a man in the act of burglary and you cannot prevent the execution of the act in any other way, you may kill him. A man sets your house on fire—commits arson; that is a crime that indirectly endangers life and often destroys it, and for that reason if you catch a man in the act and you cannot prevent him committing the crime in any other way, you can kill him. It is the same with the crime of rape; to prevent its consummation the attempted perpetrator or the man in the act of perpetrating it may be slain, because it is an act that jeopardises life. Arson, rape, burglary, and one remaining crime—robbery—are the only high crimes that are committed in this country that we can kill to prevent the commission of, and I say all of them are crimes that in the commission of them human life is placed in danger, and it is for this reason we may slay to prevent their commission if we cannot prevent them in any other
47 way. You take robbery as an illustration. The man who engages in the commission of robbery demands your money or your life. The very demand implies he will take your life if necessary, and you can therefore kill him, not to save your purse or your coat, but your person or life. There are other instances the court might mention to you. There is one that does not exist in this country. The exercise of what was called the right of pressing British seamen into the navy—kidnapping them and placing them in the navy—and a man killing to keep from being placed in such a position was held to be justifiable. Outside of these cases, a man cannot slay except where his life is in jeopardy, really or apparently, or one of these other conditions exist- that indirectly threatens his life.

Now, let us see what the law says about this killing of another in a case of trespass:

"If one man deliberately kills another to prevent a mere trespass upon property, whether such trespass could or could not be prevented otherwise, that is murder."

There are a great many cases referred to as sustaining that doctrine.

"A bare trespass against the property of another not his dwelling-house is not sufficient provocation to warrant one in using a deadly weapon in his defense, and if he do and kill the trespasser it will be murder."

Now, then, if these Jones boys were there under a claim of right to get this property, though they may ha*d* actually had no right to it, and Will Jones was killed by the defendant for that reason, that would be a killing for a bare trespass.

Now, a word further upon the proposition that I have already adverted to, as to what was his duty at the time. If that danger

was real, coming from the hands of Will Jones, or it was apparent as coming from his hands and as affecting this defendant by some overt act at the time, was the defendant called upon to avoid that danger by getting out of the way of it if he could? The
48 court says he was. The court tells you that he was. There is but one place where he need not retreat any further, where he need not go away from the danger, and that is in his dwelling-house. He may be upon his own premises, and if a man, while so situated and upon his own premises, can do that which would reasonably put aside the danger short of taking life, if he can do that, I say, he is called upon to do so by retreating, by getting out of the way if he can, by avoiding a conflict that may be about to come upon him, and the law says that he must do so, and the fact that he is standing upon his own premises away from his own dwelling-house does not take away from him the exercise of the duty of avoiding the danger if he can with a due regard to his own safety by getting away from there or by resorting to some other means of less violence than those resorted to. Now, the rule as applicable to a man of that kind upon his own premises, upon his own property, but outside of his dwelling-house, is as I have just stated. The rule is different in the dwelling-house, and the difference, as I have told you, between his situation there and otside of it is that when he is there he can stand right where he is, and the rule as laid down by the law on this subject is this:

"The rule laid down by later authorities and sanctioned by text-writers of ability is this: It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself; and here let me call your attention to a very apt illustration which is used, whether in a reported case or whether as the expression of a text-writer I am not certain, but it is a convenient illustration to have before you. Manslaughter and excusable homicide, as you will see later on, approach each other very nearly, and the distinction between them is thus indicated: In excusable homicide (that is, a case of self-defense) the slayer could not escape if he would; in manslaughter he would not escape if he could."

U. S. *vs.* King, 34 Fed., 308.

Now, right in this connection, if the proof shows that there was an act being done by Will Jones of such a character, not the mere fact that he may have had a pistol upon his person, not
49 the mere fact that he may have had his hands in a certain position, but you are to pass upon all these things together as intelligent men to enable you to see whether or not at that time he was doing that really and actually which indicated deadly danger upon his part to this defendant, or apparently so, as evidenced by the acts then being executed by him. If either one of these conditions exist, if that be true, and that is what you are to find first, and then you are to see whether this defendant could have avoided the danger really or apparently existing, and if he could have done so it was his duty to do so. If he could and he did not do so, but

took a human life, the life of Will Jones, under such circumstances he would be guilty of manslaughter, because that is a state of case where he would not avoid the danger if he could, and the other case, where he can kill, is a state of case where he could not avoid the danger if he would.

You now have an understanding, as given you by the law, of what sort of a case a man has a right to kill and be excused in so doing, or the state of case where a killing exists and where it is not without crime wholly, but is manslaughter. There are other conditions that I will give you presently which are further illustrative of that.

You want to know, in this connection, whether or not threats made by Will Jones, the deceased, would give the defendant the right to kill him. You want to know what figure threats, either communicated or uncommunicateed, cut in a case. You are to know how to view them and how the law regards them, and you must be governed by the law. You cannot avoid that. The defendant has asked for instructions upon this question of threats. I think I can the better give you an understanding in regard to this matter by reading to you from a case decided in the Supreme Court of
50 the United States, where this very question was discussed and where they declare what figure threats cut in a case—communicated threats—that is, threats of a deadly nature—that have been made and carried to the defendant in this case and threats that were uncommunicated. Now, first, upon the doctrine of uncommunicated threats, how you are to view them. You will understand that they are only illustrative facts under any circumstances—that is to say, this defendant could not kill Will Jones because Will Jones had threatened him. A principle of law of that kind would do away with all the protecting power of the law, because if I wanted one of you gentlemen killed and I was base enough to want such a thing, I could go and tell somebody else that you had threatened his life, and he would go and slay you, and it would turn out that I was a liar, and that no such thing was said by you. I give you this illustration to show you the power and justice of this principle of the law. We are to ascertain what this principle is and then make an application of it. We are not to be led astray by it; we are not to pervert justice by being misguided by this as an assertion of a principle that is not a correct one. But threats do or may cut a figure in a case. Let us see about them. I first speak of communicated threats.

When the question is as to what was the deceased's attitude at the time of the fatal encounter, recent threats made by him are relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. Evidence of that character is not relevant to show the *quo animo* of the defendant, because it could not show his mental condition when he had not heard of them; but they may be relevant to show that at the time of the meeting the deceased was seeking to take his life.

Wiggins *v.* State, 93 U. S., 467.

51 Now, that is it. When it is a question as to what was the deceased's attitude at the time, you can then take into consideration these uncommunicated threats, not that they influence the mind of the defendant at the time, but you are to take them into consideration as illustrative facts. If the evidence in the case shows a peaceable purpose and you are satisfied with that purpose—it is portrayed by other testimony in the case—then uncommunicated threats pass out of it; they cut no figure at all, because they could not have any influence on the mind of the defendant, for they have not come to the mind.

But now we come to other threats. But before passing to threats that are called uncommunicated threats I desire to give you the language of Mr. Justice Clifford upon the subject that has been given you already under the second proposition of the law of self-defense—that is to say, the killing of another, and the claim of exemption from punishment upon the doctrine that there was apparent danger; that, really or apparently, danger to life existed. Reading from the dissenting opinion of Mr. Justice Clifford, where there is one of the most able collections of authorities upon this subject to be found anywhere, reported in 93 U. S., 465:

"Unless the party had reasonable ground of apprehension at the time, the justification will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time."

How just, how humane, and how proper that protection is.

Again:

"Remarks already made are sufficient to show that a bare fear of danger to life, unaccompanied by any overt act or manifestation indicative of a felonious intent to that effect, will not justify the person entertaining such fears in killing the supposed assailant. Such a defense is not made out unless all the conditions of the proposition before explained concur in the immediate circumstances which attend the act of homicide."

52 Again, in the case of Newcomb *v.* The State, 32 Miss., it was held that the belief on the part of the accused that the deceased designed to kill him is no excuse for the homicidal act unless the deceased at the time made some attempt to execute such design and therefore induces the accused reasonably to believe that he intended to do so. These are the propositions bearing upon this question.

We now come to the branch of the case in regard to previous communicated threats and what figure they cut—threats in this case that were carried to the defendant, made by his wife's nephew.

(At this point the jury by permission of the court retired for a short recess.)

Gentlemen, we were upon the subject of previous communicated threats. I wish to tell you what position they rightfully have in a case as proven facts. I have already told you that a man could not

kill because another had made previous threats against him, and I also showed you, as I think, the philosophy of that principle of the law, its wisdom, its justice, and its protecting nature when the rule is properly understood and properly applied, but they do have a position in a case under certain circumstances. They are illustrative facts, and to make them relevant, so that you may consider them at all—that is, threats, now, that were communicated—at the time of the killing, at the time the blow was struck (I mean by "at that time" just at that moment or immediately previous thereto), the deceased must have been doing some act of an overt character which, when considered in the light of previous threats, would indicate to the mind of the defendant as a reasonable person, situated as he was, that the deceased meant to take his life. In such
53 a condition you may consider them as illustrative facts to illustrate the other condition. I will now read you what the law says upon that subject:

"Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeit his right to life until by some actual attempt to execute his threats or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

Wiggins *vs.* State, 93 U. S., 483.

Now, I read this as it is. Of course there is no contention here as to the lawless and desperate character of the deceased. In fact, the law gives him a good character, as well as it does everybody else, until it is legally and successfully assaulted; but I read this proposition as it is asserted here, and that portion of it which is relevant to this case is in regard to previous threats made by the deceased. Again, upon that subject:

"Jurists and text-writers appear to concur that antecedent threats alone, whether communicated or not, will not justify a subsequent deadly assault by the other party unless the party who made the previous threats manifests at the time of the act a design to carry the threats into immediate effect."

Manifestly with the design of some act being done by him. Now, again, if the threat is uncommunicated, and it is a serious question in your mind as to what was the position of the parties, then you may consider uncommunicated threats to illustrate the position of the parties to enable you to conclude what that position was. If that is not a question, if the evidence you find to be true in the case discloses the condition and position of the parties, then the uncommunicated threats pass out of the case. If the evidence in the case shows at the time of the killing that the deceased was making, really or apparently, a violent demonstration, then you may take into account, as the defendant had a right to take into account at the time, the communicated threats, according to the principle of the law that I have given you. A little further upon that subject:

54 "Where evidence has been given making it a question for the jury whether the killing was excusable self-defense, evidence of threats made by the deceased against the defendant a short time before the killing, but not communicated to the defendant before the killing, is admissible."

That is upon that proposition I have already given you with reference to uncommunicated threats. Evidence of threats communicated *are* not admissible and *are* not competent to be weighed by you unless there be testimony tending to show some demonstration indicating a design to carry them out at the time of the killing.

These propositions I have read to you, these principles of the law, express the true doctrine upon this question of what figure threats, communicated and uncommunicated, cut in this case. They do not mean that this defendant could kill because of them. If he killed because of these threats alone—that is, the existence of a premeditated design to slay without just cause, in the absence of legal provocation, in the absence of mitigating facts, and threats as a cause of slaying, when that state of case exists, would go to evidence the existence of malice aforethought, and could not be taken into account by you in passing upon the question of self-defense.

Now, here is a proposition asked by counsel for defense. It is in substance what I have already given you, but I will read it:

"Communicated threats, if proven, may be considered by the jury for the purpose of determining the question as to whether or not the acts and conduct of the deceased at the time of the killing were such as would lead a man of ordinary courage and prudence, situated as was the defendant, to believe that the deceased then and there designed to kill him or to do him some great bodily harm, and whether or not there was imminent and impending danger, real or apparent, of such design being then and there accomplished. In determining this question the jury should not give the defendant the benefit of needlessly exaggerated fears. He is not entitled to be acquitted upon the mere fear of apprehension of danger,
55 however honestly and sincerely entertained, if there was no overt act upon the part of the deceased evincing a present design or intention then and there to kill him or to do him some great bodily harm, and if there was no *no* imminent danger, real or apparent, of such design being then and there immediately accomplished. But they should not try him by the light of subsequently developed facts nor require of him the same cool and correct judgment which they can now bring to bear upon the occurrence. They should put themselves, as far as possible, in the place of the defendant, and judge of his acts and conduct at the time he struck the fatal blow as they would the acts and conduct of a man of ordinary prudence and courage situated as was defendant."

That means, of course, that you are to look at the defendant situated as he was; you are to view the transaction in the light of the surrounding facts and circumstances, and this is given you as part of the law of this case.

I repeat to you, that none of these threats are justification for the killing. They are only illustrative. They can only be considered

by you for the purposes I have named. If they did not exist, if this deceased young man was not at the time of the killing actually or apparently making a demonstration that would indicate a deadly purpose, then the communicated threats pass out of the case, because they cannot be considered. If there is a serious question in your minds as to what was the attitude of the parties, then the uncommunicated threats are to be taken into consideration by you to enable you the better to see what the real attitude was—what was the attitude of the deceased—and not that these uncommunicated threats would give the defendant the right to slay because they had been made.

You are to bear in mind that the first proposition of the law of self-defense was that the defendant in this case was in the lawful pursuit of his business—that is to say, he was doing what he had a right to do at the time. If he was not he deprives himself of the right of self-defense, and, no matter what his adversary may do, if he by his own conduct creates certain conditions by his own wrongful conduct he cannot take advantage of such conditions created by his own wrongful act or acts.

56 Now, for fear that we might be led astray by the assertion of this principle, the law tells us what things as done by a party will deprive him of the right of self-defense, if he does them, when he is cut off from that right. It does not necessarily follow that he would be guilty of murder because the adversary may be doing that which is wrong at the time, and yet the party who kills would not so far be in the right as that he could be justified in killing. For example, take the proposition that I now give to you, where the law says that if a man commences an assault or attack or battery upon another and in the course of the affray which ensues he kills the man that he first assaults, it may be that that other uses excessive violence that he had no right to use; in a simple assault he would only have the right to use such violence as would inflict a slight injury, and if he uses excessive violence he puts himself in the wrong, and if he is killed by the first aggressor, who commits the simple assault, the first aggressor would only be so far in the wrong as that he would be guilty of manslaughter, and he could not claim the right of self-defense because he had wrongfully precipitated a state of case that he could have avoided and one which the law commands him to avoid.

Again, attacking another with a deadly weapon. A man is the first aggressor in a deadly way with a deadly weapon. What right has he to set up that condition created by him as one that he can so far act upon as that he can slay because of the attack and be excused in doing it. He cannot, says the law.

Again, going to the place where the person slain is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray. Now, if a man does that, he is in the wrong, and he is cut off from the right of self-defense, no matter what his adversary may do, because the law says in the very language

57 of these propositions relating to the law of self-defense that he must avoid taking life if he can with due regard to his

own safety. Whenever he can do that he must do it; therefore, if he has an adversary and he knows that there is a bitter feeling, that there is a state of feeling that may precipitate a deadly conflict between himself and his adversary, while he has a right to pursue his usual daily avocations that are right and proper, going about his business, to go and do what is necessary to be done in that way, yet if he knows that condition I have named to exist and he goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray if it comes up, he is there to have it, and he acts for that purpose, the law says there is no self-defense for him.

Again, the use of provoking language or, it seems, resorting to any other device in order to get another to commence an assault so as to have a pretext for taking his life. Agreeing with another to fight him with a deadly weapon. Either one of these cases, if they exist as the facts in this case, puts the case in such an attitude that there is no self-defense in it. If the defendant knew there was a deadly feeling existing between himself and this young man and he could have avoided that by the exercise of due care, it was his duty to do so. If he went to the place where that young man was, armed with a deadly weapon, even if it was upon his own premises, with the purpose of provoking a difficulty with him, in which he might use that deadly weapon, or of having a deadly affray with him, it does not make any difference what was done by the young man, there is no self-defense for the defendant. The law of self-defense does not apply to a case of that kind, because he cannot be the creator of a wrong, of a wrong state of case, and then act upon it. Now, if either one of these conditions exist, I say, the law of self-defense does not apply in this case.

58 Now, a few words in reference to the character of the title of this property. This evidence has gone before you, which enables you intelligently to say what led up to this affray. It has been stated to be a principle of the law by Judge Rogers, in his argument of this case, that there was no right to kill claimed, or that there could not be any right to kill claimed, because of the claim asserted to this property. That is not claimed in the case. If the property belonged to the younger brother of the deceased—if it did, in the language of this law that I will give you presently, which is asked for by the defendant—he and his brothers would still be required to obtain that property in a lawful way if it was his or he had an honest claim to it, and he was obtaining it or seeking to obtain it in a lawful way, if he was seeking to get it by peaceable means from this place, because if it was his own or he had an honest claim to it he could go to the premises and drive it off from there. He could do that in a peaceable way or he could go to court and do it. He must assert his right of possession in a lawful way and in a peaceable way. The fact that it may have been his or that — may have had an honest claim to it would not give him the right to take it by violence; but if he did take it by violence and that violence was not imminent, really or apparently, at the time of the killing, then the defendant would have no right to anticipate violence of

that character and he could not exercise a deadly act for the purpose of preventing his taking the property. Now, upon the other hand, if the defendant had an honest claim to the property, if it was upon his premises, he had a right to assert that claim in a peaceable way, but he could not assert it by violence. He could not have killed either one of these boys because they sought to take away the cow and calf, for the reason he could not have exercised violence to that extent and be excused in doing it, because if it was
59 taken by them under a claim of right, though it may not have belonged to them, that would not be even a larceny, and, as I have told you, you cannot kill because a party may be committing an ordinary larceny and be without fault, be without blame, be without crime. Should you be seeking to arrest a man who had committed larceny and in the course of the arrest you killed him you are excused upon the ground that you are exercising the right of arrest, but to prevent the taking of property you must not in your mind and by your judgment weigh a man's life in the balance against the value of that property, and the law does not permit that.

These principles are given you by the court as the law in this case, and in this connection I give you a declaration that is asked by the defense:

"If the jury believe from all the evidence that defendant had in his possession a cow, the property of Ed. Jones, which he declined to give up unless the said Jones established his right to her possession by law; that the deceased in company with his brothers came to the defendant's place the morning of the day on which the difficulty occurred; that defendant refused to permit them to take the cow away and told them in substance that they could not get her except by law, and ordered them to leave his premises and not to return; that after this there was communicated to the defendant threats which the deceased had previously made against his life; that when the defendant returned home he saw the deceased and his brothers within his enclosure endeavoring to get the cow away without his consent; that he went through his yard and orchard with a gun which he had with him when he arrived at home, to where deceased was, not for the purpose of having a difficulty with the deceased or his brothers, but for the purpose of getting them to let the cow alone and go away from his premises; that deceased and his brothers were requested to go away and to let the cow alone, and instead of doing this a quarrel ensued between them, and the deceased, being a left-handed man, put his left hand on a pistol in his left trousers pocket and with his hand in that position went towards defendant in an angry and threatening manner when defendant was not attempting to harm him, and as he got near the defendant made an overt act as if he then and there intended and designed to shoot the defendant, and that the defendant then and there had good grounds to believe from such acts of deceased and did believe from deceased's acts and conduct that deceased intended to shoot him, and defendant in good faith to prevent this knocked

the deceased down with his gun, then he was under the law justifiable, and the jury should acquit him"—

60 Provided there was no other reasonable means of protecting himself from death or great bodily harm. Now, upon the principles I have already given you, if that was the state of case and yet there was at hand available means—reasonable means—by which he could have protected himself from that condition, it was his duty to do so before flying to this dernier remedy of taking life.

We now come to the propositions that relate to the method you are to adopt in finding the facts in this case—in finding what the proof shows; in other words, what has been established here.

But before I come to that subject, here is another proposition asked for by the defense that is partially given as modified:

"The defendant would not be justifiable in killing the deceased because of the fact that he and his brothers may have been attempting to take from his possession a cow about which there was a controversy between them; yet if the jury believe from the evidence that the defendant was and had been for some time in the peaceable possession of the cow which deceased and his brothers were endeavoring to take away under the honest belief that he had a right to keep her, then the deceased and his brothers had no right to enter upon the defendant's premises for the purpose of taking such cow away by force and violence and against the defendant's consent, and the defendant could not be deemed the aggressor in the difficulty from the mere fact, if established by the evidence, that he would not permit the deceased and his brothers to do this and because he ordered them away from his premises while they were attempting to do this and forbade them taking the cow with them."

But the defendant could not kill the deceased because he and his brothers were driving the cow away or seeking to do so, even if they were driving her away by force. If they were taking he- by forcible means, though they would be committing a trespas and doing that which they had no right to do, yet it is not one of these things—one of these rights—that belongs to the defendant which gives him the right to take human life to prevent, as he could only kill to protect his own life or his person from great bodily harm.

61 If the deceased and his brothers had a right to the possession of the cow and the defendant in good faith denied this right, it was their duty to assert their right in a lawful way and not by force. If, however, they had a right to the cow, they would be getting her in a lawful way when they drove her away in a peaceful manner—that is, upon the principle that any man has a right to peaceable take his own wherever he may find it, or that which he honestly and in good faith claims to be his own.

Now, these principles are given you for the purpose of showing the status of this case as affecting these propositions. They may be termed collateral principles; but they have come into the case, and, as I believe, they came into it properly and came into it for the purpose of not enabling you to say whether he had a right to kill because of the existence of the controversy over the cow, or that the deceased had a right to assault the defendant because of that

controversy, but as a cause leading up to this difficulty and making it more intelligent, for the purpose of enabling you properly to see the whole of it.

Now, a few words in reference to the rules that you are to adopt to find what the truth of this case is—to find what the evidence shows. You are aware, of course, that before you can find the defendant guilty of any crime you are to be satisfied as reasonable men. Now, let us see what is meant by that, and we will give it to you in the language of the law as declared in a case in England and quoted in Hopt *v.* Utah, 120 U. S., 430:

"I have heard, said the chief baron, addressing the jury, the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life. No doubt the question before you today, involving as it does the life of the prisoner at the bar, must be deemed to
62 be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect."

Again, in the case of Commonwealth *v.* Webster, a celebrated case in the judicial history of this country, the supreme judicial court of Massachusetts stated in its charge that it was not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged against the prisoner was more likely to be true than the contrary, and said:

"The evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt."

Again, upon the same subject:

"A reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt, but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt; but if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty."

This is the law defining what is meant by this doctrine of reasonable doubt. It means a doubt for which a good reason can be given. It is only that sort of doubt that you are to regard in a case. If you are to be governed by other doubts you would never be able to

reach a conclusion. It means a reasonable doubt, upon the whole case. It does not mean a reasonable doubt of an isolated proposition standing alone, but only when it is taken in conjunction with and as illustrated by other propositions in the case. I say, you are to pay no attention to any other kind of doubts than reasonable doubts. You will always find some sort of doubts confronting your minds as against every proposition growing out of human conduct.
63 You could never come to a conclusion of anything growing out of human conduct or human action if all doubts are to be regarded, because there are always some sort of doubts, things of that kind, flitting before us to confuse us, to obstruct the action of our minds and lead us astray; but the standard erected by the law is the character of doubt we are to regard, said by the law to be real, substantial doubt of guilt, coming naturally and reasonably to the minds of the jury from all the facts that they may find to be true in the case.

Now, gentlemen, there are rules of the law that are directory upon you in regard to the weight of evidence; that is one of the great duties cast upon you, one of the great difficulties you have to contend with, to find what evidence is true. If there is a conflict upon the material propositions in a case, that conflict is to be reconciled by you, if possible, on the theory of an honest mistake; but you are not to forget at the same time that your great duty, your paramount duty, is to find out what the truth is, whether you can reconcile the conflict or not. Your duty is to base your finding upon the exact truth as you may find it. Whenever that conflict exists you are to reconcile it if you can, but in your research for truth you are to see where the truth lies, upon which side it lies, and you are to do that by reason of the probability, the reasonableness and naturalness of the statement. You are men of mature judgment, you are men of wisdom, and you are to look at the statements of witnesses in the light of your experience in life. If a statement, when looked at in a proper way by you, does not seem to be true, does not seem to be consistent, does not seem to be natural, does not seem to be reasonable in the light of the other truths in the case or when standing alone, that is evidence that it is not true. If it is, if it has these attributes, then it has the badge of truth characterizing it
64 and surrounding it, and you may take it as a proposition that has truth in it, because these are the things that enable us to say whether it is true or false. Then you take this evidence, you go right to the occurrence. One of the very material things is, What was the position of these parties at the time of the striking of the fatal blow? You are to see this from the light of the positive facts, such as described by the eye-witnesses who saw the occurrence, as to what was the position of the man killed and the man doing the killing, as well as by any other circumstances that may be pertinent and relative to the proposition. You are to find out what the attitude of the defendant was at the time. You are to do all of these things and take them all into consideration. You are to weigh this evidence in the light of these rules that I have given you.

Again, you are to consider the interest that witnesses may have

in giving testimony. If they are brought in here as witnesses on either side by the power of the law, that relation to the case does not necessarily give them any undue interest that you might consider against their evidence. You are to look at the very appearance of a witness upon the stand, his very manner of giving evidence, its very consistency, its very probability, and its very naturalness. You go to the interest that all the witnesses may have in the case. You take the statements of the defendant. He goes upon the stand, and when he goes there he becomes as any other witness, occupies the same relation, and you are to weigh his testimony as you view that of anybody else in a like situation; and as to motive, he is like the balance of us, presumably no better or no worse as far as this proposition is concerned. He is susceptible to the interest that may operate upon the minds of all of us when situated in such a way.

You are not to disregard what he says on that account.
65 You are to consider his interest in the case, his relation to it, and how he may be affected by it; but, above all, you are to see whether he is corroborated by circumstances and by other reliable facts or the testimony of other positive eye-witnesses or whether he is contradicted by such testimony. If he is contradicted, his evidence is weakened to that extent that you may attach credit to the contradicting facts. If he is corroborated, his evidence is strengthened to the extent that you may attach credit to the corroborating facts.

I have already told you to what certainty guilt must be proven here. There are a few other propositions of law necessary to give you before concluding.

If at the time of this killing it be true that the deceased was doing an act of apparent or real deadly violence and that state of case existed, and yet that the defendant at the time could have avoided the necessity of taking his life by the exercise of any other reasonable means and he did not do that, because he did not exercise other reasonable means that would have with equal certainty saved his life, but resorted to this dernier remedy, under those facts and circumstances the law says he is guilty of manslaughter. Now, let us see what that requires. It requires, first, that the proof must show that Will Jones was doing an act of violence or about to do it or apparently doing it or about to do it, but that it was an act that the defendant could have escaped from by doing something else other than taking the life of Jones, by getting out of the way of that danger, as he was called upon to do, as I have already told you, for he could not stand there as he could stand in his own dwelling-house, and he must have reasonably sought to avoid that danger before he took the life of Jones, and if he did not do that, if you find that to be

Jones' position from this testimony, and he could have done so,
66 but did not do it, the defendant would be guilty of manslaughter when he took the life of Jones, because in that kind of a case the law says that the conduct of Jones would be so provocative as to reduce the grade of crime; yet, at the same time, it was a state of case that the defendant could have avoided without taking his life, and because he did not do it he is guilty of the crime

of manslaughter. Now, if the defendant was careless and negligent, and for that reason was misled by the facts—but these propositions are given upon the hypothesis and supposition that the defendant was in the right and that this state of case that I have already enumerated actually existed, or there was something existed that would bring into existence and permit you to believe this second proposition, and that is, that at the time Jones was doing something which really and actually was not of a deadly nature or about to be of a deadly nature, but was conceived to be so by the defendant—making an honest mistake—because he had failed to exercise reasonable care to know the truth, and he was in the right, and Jones was doing something that misguided him, but not of a deadly nature, but the defendant conceived it to be of a deadly nature, and because of this mistake upon his part he took the life of Jones because of that, he is guilty of the crime of manslaughter, because he did not do his duty. His duty was to make that observation under the circumstances that would have enabled him to know the true condition.

Again, if it be true that Will Jones at the time he was killed was exercising deadly violence or about to do so, or apparently exercising it, or apparently about to do so, and the defendant could have paralysed the effect of that violence without taking the life of Jones, but he did not do it, but resorted to this deadly violence when he could have protected his own life without resorting
67 to that dernier remedy—if that be the state of case, the law says he is guilty of manslaughter, because he is doing what he had no right to do. This great law of self-defense commands him at all times to do that which he can do under the circumstances, to wit, exercise reasonable care to avoid the danger by getting out of the way of it or by exercising less violence than that which will produce death and yet will be equally effective to secure his own life. If either one of these propositions exist, and they may exist to the extent I have defined to you, and the defendant took the life of Jones under these circumstances, the defendant would be guilty of manslaughter.

Now, I say to you in conclusion that I have defined to you this crime of murder. I have defined to you this crime of manslaughter. I have defined to you the law of self-defense, embracing real or apparent danger brought into existence by the wrongful conduct of Jones. I have told you what would cut the defendant off from the right of self-defense, notwithstanding the wrongful and dangerous attitude of Jones. I have told you what the law says relating to the doctrine of previous threats, communicated or uncommunicated. I have told you how the defendant may be guilty of manslaughter by the use of excessive violence, by carelessly observing the situation, or by the other propositions that I have named to you, which defines the state of case where he could have avoided the necessity of taking life by the exercise of reasonable care and at the same time protect himself. I have given you the rules that are directory upon you as to how you shall weigh this evidence.

I say to you, in conclusion, to find the truth of this case, find

where the truth lies, find what the truth is as far as you can, and then apply to it that principle of the law that is applicable to that truth. If, when you find the truth and apply that principle
68 of the law to it, you are satisfied beyond a reasonable doubt, from the whole of the evidence and the application of that principle of the law applicable thereto, that guilt exist- here, if it be murder, name it so, as under the form that is to be found on the back of this indictment. If you find, upon the other hand, that that crime does not exist, but that the crime of manslaughter does exist, because the killing was wrongful, because it may come under one or the other of these heads that I have enumerated to you, and you are satisfied beyond a reasonable doubt of its existence, your duty is to convict of that crime. If you are not satisfied beyond a reasonable doubt of the guilt of this defendant by the light of the evidence that you may find to be true and by the principles of the law defining either one of these crimes, that either one of them exist-, your duty would be to find the defendant not guilty.

Gentlemen, I submit this case to you. I ask you to give it due consideration. If the law has been violated by the taking of an innocent human life in a wrongful way or in a criminal way, vindicate and uphold the majesty, the dignity, and supremacy of the law. If it has not been violated by the taking of an innocent human life, but, upon the other hand, it was the taking of a guilty life or the life of a man that was seeking the life of the defendant, and that it was a condition from which the defendant could not escape except by doing as he did do, then you are to acquit him. You are to see, in other words, whether at the time of this killing it was a necessity, really or apparently, for this defendant to take the life of Will Jones to save his own. If it was not, he is a criminal; if it was, he is not. The case is with you.

69 The defendant excepted to the following language of the court in the charge, to wit:

"You will necessarily want to know whether either one of these propositions of the law of self-defense can be employed because a threat has been made against the life of the defendant, if you believe it has been made. You will want to know whether or not he had a right to assert this law of self-defense because these parties came upon his premises. You will want to know in this case how far the duty devolved upon him to avoid the necessity of taking life—that is, whether or not he was called upon as he was situated to exercise all reasonable means at hand to avoid taking life before he did do it, or whether he could stand, situated as he was upon his own premises, and take life, provided the danger did exist, but that it was danger he could have avoided by the exercise of other means than those he resorted to. You must know all these propositions of law in order that you may apply them correctly.

Now, first, we will give you the two propositions of the law of self-defense: First, the law says, a man who is in the lawful pursuit of his business—that means he was doing what he had a right to do at the time—is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily

harm. That is the first proposition. It embraces two things: First, he must be doing what he had a right to do. Then, he must have been attacked by another in a certain way—in such a way as that the circumstances attending that attack would indicate a purpose on the part of the party being made to take his life or to do him some great injury that might produce death or great violence upon his person, such as maiming or wounding him in a serious way. These are the first conditions that are required to be found, and if they are in existence he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power."

The defendant also excepted to the following language of the court in the charge, to wit:

"Now, let us go over it again that we may make no mistake. A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, upon that proposition we first ascertain from this evidence whether Will Jones was really or apparently about to execute a deadly purpose, and that it was so immediate, really or apparently so immediate, so then and there existing that the defendant could not avoid a deadly result that might follow from the act of Jones except by doing as he did do—by taking his life."

70 The defendant also excepted to the following language of the court in the charge, to wit:

"Now, you may be misled by that without some other explanation is given, and let me explain it to you in the language of a most eminent court, in my judgment—at least, a most eminent judge—who declared what was meant by this doctrine of apparent danger when he said that 'no conception of bare fear will give a party the right to slay, and a man could not be killed upon a state of bare fear, but that there must be something else existing than that.'

"Judge Simrall, of the supreme court of Mississippi, in the case of John Evans *v.* State, 44 Miss., said:

"'To shoot down another on sight and who at the time is making no hostile demonstration dangerous to life and limb, and especially if not prepared and armed so to do, is in law murder. It is murder because the law tolerates no justification and accepts no excuse for the destruction of human life on the plea of self-defense except that the death of the adversary was necessary or apparently so to save his own life or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life or of great personal injury must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life. When we use the term "apparent"—"apparent danger"—

we mean such overt actual demonstration by conduct and acts of a design to take life or to do some great personal injury as would make the killing apparently necessary to self-preservation.'"

The defendant also excepted to the following language of the court in the charge, to wit:

"That is the law; that is what it says; that is what we are to administer here—the best we can and nothing else but that. It says that he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power."

The defendant also excepted to the following language of the court in the charge, to wit:

"Now, a word further upon the proposition that I have already adverted to, as to what was his duty at the time. If that danger was real, coming from the hands of Will Jones, or it was apparent as coming from his hands and as affecting this defendant some overt act at the time, was the defendant called upon to avoid that danger by getting out of the way of it if he could? The court tells you that he was. There is but one place where he need not retreat any further, where he need not go away from the danger, and that is in his dwelling-house. He may be upon his own premises, and if a man, while so situated and upon
70½ his own premises, can do that which would reasonably put aside the danger short of taking life, if he can do that, I say, he is called upon to do so by retreating, by getting out of the way if he can, by avoiding a conflict that may be about to come upon him, and the law says he must do so, and the fact that he is standing upon his own premises away from his own dwelling-house does not take away from him the exercise of the duty of avoiding the danger if he can with a due regard to his own safety by getting away from there or by resorting to some other means of less violence than those resorted to. Now, the rule as applicable to a man of that kind upon his own premises, upon his own property, but outside of his dwelling-house, is as I have just stated."

The defendant also excepted to the following language of the court in the charge as follows, to wit:

"Now, right in this connection, if the proof shows that there was an act being done by Will Jones of such a character, not the mere fact that he may have had a pistol upon his person, not the mere fact that he may have had his hands in a certain position, but you are to pass upon all these things together as intelligent men to enable you to see whether or not at that time he was doing that really and actually which indicated deadly danger upon his part to this defendant, or apparently so, as evidenced by the facts then being executed by him. If either one of these conditions exist, if that be true, and that is what you are to first find, and then you are to see whether this defendant could have avoided the danger really or apparently existing, and if he could have done so it was his duty to do so. If he could and he did not do so, but took a human life, the life of Will Jones, under such circumstances he would be guilty

of manslaughter, because that is a state of case where he would not avoid the danger if he could, and the other case where he can kill is a state of case where he could not avoid the danger if he would."

The defendant also excepted to the following language of the court in the charge, to wit:

"Now, that is it. When it is a question as to what was the deceased's attitude at the time, you can then take into consideration these uncommunicated threats, not that they influence the mind of the defendant at the time, but you are to take them into consideration as illustrative facts. If the evidence in the case shows a peaceable purpose and you are satisfied of that purpose—it is portrayed by other testimony in the case—then uncommunicated threats pass out of it; they cut no figure at all, because they could not have any influence on the mind of the defendant. They have not come to that mind."

The defendant also excepted to the following language of the court in the charge, to wit:

"But before passing to threats that are called uncommunicated threats I desire to give you the language of Mr. Justice Clif-
71 ford upon this subject that has been given you already under the second proposition of the law of self-defense—that is to say, the killing of another and the claim of exemption from punishment upon the doctrine that there was apparent danger; that really or apparently danger to life existed. Reading from the dissenting opinion of Mr. Justice Clifford, where there is one of the most able collections of authorities upon this subject to be found anywhere (reported in 93 U. S., 465):

"'Unless the party had reasonable ground of apprehension at the time, the justification will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution if there be no actual danger at the time.'

"How just, how humane and proper that protection is."

The defendant also excepted to the following language of the court in the charge, to wit:

"Gentlemen, we were upon the subject of previous communicated threats. I wish to tell you what position they rightfully have in a case as proven facts. I have already told you that a man could not kill because another had made previous threats against him, and I also showed you, as I think, the philosophy of that principle of the law, its wisdom, its justice, & its protecting nature when the rule is properly understood and properly applied; but they do not have a position in a case under certain circumstances. They are illustrative facts, and to make them relevant, so that you may consider them at all—that is, threats—now, that were communicated at the time of the killing, at the time the blow was struck (I mean by 'at that time' just at that moment or immediately previous thereto), the deceased must have been doing some act of an overt character which, when considered in the light of previous threats, would indi-

cate to the mind of the defendant as a reasonable person, situated as he was, that the deceased meant to take his life."

The defendant also excepted to the language of the court in the charge, as follows, to wit:

"Of course there is no contention here as to the lawless and desperate character of the deceased. In fact, the law gives him a good character, as well as it does everybody else, until it is legally & successfully assaulted; but I read this proposition as it is asserted here, and that portion of it which is relevant to this case is in regard to previous threats made by the deceased."

The defendant also excepted to the following language of the court in the charge, to wit:

"Now, again, if the threat is uncommunicated and it is a serious question in your mind as to what was the position of the parties, then you may consider uncommunicated threats to illustrate
72 the position of the parties to enable you to conclude what that position was. If that is not a question, if the evidence you find to be true in the case discloses the condition and position of the parties, then the uncommunicated threats pass out of the case."

The defendant also excepted to the language of the court in the charge as follows, to wit:

"Again, attacking another with a deadly weapon. A man is the first aggressor in a deadly way with a deadly weapon. What right has he to set up that condition created by him as one that he can so far act upon as that he can slay because of the attack and be excused in doing it. He cannot, says the law. Again, going to the place where the person slain is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray. Now, if a man does that, he is in the wrong, and he is cut off from the right of self-defense, no matter what his adversary may do, because the law says in the very language of these propositions relating to the law of self-defense that he must avoid taking life if he can with due regard to his own safety. Whenever he can do that he must do it; therefore, if he has an adversary and he knows that there is a bitter feeling, that there is a state of feeling that may precipitate a deadly conflict between himself and his adversary, while he has a right to pursue his daily usual avocations that are right and proper, going about his business, and go and do what is necessary to be done in that way, yet if he knows that condition I have named to exist and he goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray if it comes up, he is there to have it, and he acts for that purpose, the law says there is no self-defense for him.

"Again, the use of provoking language or, it seems, resorting to any other device in order to get another to commence an assault so as to have a pretext for taking his life. Agreeing with another to fight him with a deadly weapon. Either of these cases, if they exist as the facts in this case, puts the case in such an attitude that there is no self-defense in it. If the defendant knew there was a deadly feeling existing between himself and this young man and

he could have avoided that by the exercise of due care, it was his duty to do so. If he went to the place where that young man was, armed with a deadly weapon, even if it was upon his own premises, with the purpose of provoking a difficulty with him, in which he might use that deadly weapon, or of having a deadly affray with him, it does not make any difference what was done by the young man, there is no self-defense for the defendant. The law of self-defense does not apply to a case of that kind, because he cannot be the creator of a wrong, of a wrong state of case, and then act upon it. Now, if either of these conditions exist, I say, the law of self-defense does not apply in this case."

73 The defendant also excepted to the following part of the court's instructions to the jury:

"If a killing is done where there is no malice aforethought as I have defined it, if it is done where there is no case of self-defense, it is unlawful; if it is voluntarily done, or done wilfully, as I have defined the expression willful, then it is necessarily a case where there is manslaughter. Now, in connection with the law of self-defense I will give you some other propositions presently which will show you what sort of a case under the law will make manslaughter. The law contemplates, when it goes to admeasure this crime, that it is one that grows out of a condition where upon sudden quarrel two persons meet and engage in an affray, or meet and fight, and one of them kills the other, this is voluntary manslaughter. So the law says if they upon such occasion go out and fight in a field, this is one continued act of passion."

74 The defendant also excepted to the following language of the court in the charge, to wit:

"If at the time of this killing it be true that the deceased was doing an act of apparent or real deadly violence and that state of case existed, and yet that the defendant at that time could have avoided the necessity of taking his life by the exercise of any other reasonable means and he did not do that, because he did not exercise other reasonable means that would have with equal certainty saved his life, but resorted to this dernier remedy, under those facts and circumstances the law says he is guilty of manslaughter. Now, let us see what that requires: It requires, first, that the proof must show that Will Jones was doing an act of violence or about to do it, or apparently doing it or apparently about to do it; but that it was an act that the defendant could have escaped from by doing something else other than taking the life of Jones—by getting out of the way of that danger, as he was called upon to do, as I have already told you—for he could not stand there, as he could stand in his own dwelling-house, and he must have reasonably sought to avoid that danger before he took the life of Jones, and if he did not do that, if you find that to be Jones' position from this testimony, and he could have done so, but did not do it, the defendant would be guilty of manslaughter when he took the life of Jones, because in that kind of a case the law says that the conduct of Jones would be so provocative as to reduce the grade of the crime, yet, at the same time, it was a state of case that the defendant could have avoided

without taking his life, and because he did not do it he is guilty of the crime of manslaughter.

"Now, if the defendant was careless and negligent and for that reason was misled by the facts—but these propositions are given upon the hypothesis and supposition that the defendant was in the right, and that this state of case that I have already enumerated actually existed or there was something existed that would bring into existence and permit you to believe this second proposition, and that is, that at the time Jones was doing something which really and actually was not of a deadly nature or about to be of a deadly nature, but was conceived to be so by the defendant making an honest mistake, because he had failed to exercise reasonable care to know the truth, and he was in the right, and Jones was doing something that misguided him, but not of a deadly nature, and because of this mistake upon his part he took the life of Jones, because of that he is guilty of the crime of manslaughter, because he did not do his duty. His duty was to make that observation under the circumstances that would have enabled him to know the true condition.

"Again, if it be true that Will Jones at the time he was killed was exercising deadly violence or about to do so, or apparently exercising it or apparently about to do so, and the defendant could have paralyzed the effect of that violence without taking the life of Jones, but he did not do it, but resorted to this deadly violence when he could have protected his own life without resorting to that dernier remedy, if that be the state of case, the law says he is guilty of manslaughter, because he is doing that which he had no right to do. This great law of self-defense commands him at all times to do that which he can do under the circumstances, to wit, exercise reasonable care to avoid the danger by getting out of the way of it or by exercising less violence than that which will produce
75 death and yet will be equally effective to secure his own life. If either one of these propositions exist, and they must exist to the extent I have defined to you, and the defendant took the life of Jones under these circumstances, the defendant would be guilty of manslaughter."

The defendant excepted to the following language of the court in the charge, to wit:

"If the law has been violated by the taking of an innocent human life in a wrongful way or in a criminal way, vindicate and uphold the majesty, the dignity, and supremacy of the law. If it has not been violated by the taking of an innocent life, but, upon the other hand, it was the taking of a guilty life or the life of a man that was seeking the life of the defendant, and that it was a condition from which the defendant could not escape except by doing as he did do, then you are to acquit him."

The defendant also requested the court to give each of the following instructions, numbered 1, 2, 3, and 4. The court refused to give either of the same: to which action of the court in refusing to give each of said instructions the defendant at the time separately and severally excepted.

1.

The court further instructs the jury that the defendant is never required to prove that he is innocent, and, in order for him to be acquitted, it is not necessary that the jury should be satis-
76 fied in their minds that he is in fact innocent. He is not entitled to be acquitted upon a mere vague conjecture or supposition of innocence, but is whenever there arises out of the evidence a probability that he is innocent. A probability of innocence is always a reasonable doubt of guilt.

This probability of innocence need not be as reasonable as the probability of guilt. In other words, although the theory that he is guilty is more reasonable than the theory that he is innocent, yet if there arises out of the evidence and there is supported by the evidence a reasonable theory under which the defendant is probably innocent, then he is entitled to be acquitted.

2.

That whenever there arises in the consideration of the case any fact or circumstance capable of two reasonable constructions, one tending to establish guilt and the other innocence, then it is and will be your duty to give it that construction tending to show the innocence of the defendant instead of his guilt, and whenever there is in the mind of the jury a reasonable doubt, arising out of the evidence, as to any fact or circumstance in the case, it will be your duty to solve that doubt in favor of the defendant.

3.

The court instructs the jury that if they believe from the evidence that the defendant was where he had the right to be, and that he was not the provoker of nor the aggressor in the difficulty in which deceased lost his life, then the defendant was not required to retreat or flee from any danger, real or apparent, with which the evidence may show he was threatened by the deceased, but under the
77 law he had the right to stand his ground and to meet force with force sufficient to overcome his adversary, even to the extent of killing him if the evidence shows it was necessary, or would have been deemed necessary by a man of ordinary prudence and courage to do this in order to save himself from the real or apparent danger of the loss of life or grievous bodily harm then and there about to be done him by his adversary.

4.

Uncommunicated threats, if proven, may be considered by the jury whenever the evidence is conflicting as to who was the aggressor in the difficulty, and whenever there is uncertainty as to this, as shedding light upon that question, and also in determining the frame of mind which the deceased had and entertained towards the defendant.

Communicated threats, if proven, may be considered by the jury for the purpose of determining the question as to whether or not the acts and conduct of the deceased at the time of the killing were such as would lead a man of ordinary prudence and courage, situated as was defendant, to believe that the deceased then and there designed to kill him or to do him some great bodily harm, and whether or not there was imminent and impending danger, real or apparent, of such design being then and there accomplished. In determining this question the jury should not give the defendant the benefit of needlessly exaggerated fears. He is not entitled to be acquitted upon the mere fear or apprehension of danger, however honestly and sincerely entertained, if there was no overt act upon the part of the deceased evincing a present design or intention then and there to kill him or do him some great bodily harm, and if there was no imminent danger, real or apparent, of such design being then and there immediately accomplished.

78 But they should not try him by the light of subsequently developed facts, nor require of him the same cool and correct judgment which they can now bring to bear upon the occurrence. They should put themselves as far as possible in the place of the defendant and judge of his acts and conduct at the time he struck the fatal blow as they would of the acts and conduct of a man of ordinary courage and prudence situated as was defendant.

And if the jury have a reasonable doubt, arising out of the evidence, as to whether or not a reasonable man of ordinary prudence and courage, when situated as was defendant at the time he struck the fatal blow, would have believed and would have had good reason to believe from the conduct and actions of the deceased, as disclosed by the evidence, at the time the defendant struck the deceased that he was then and there in immediate and imminent danger of the loss of life or grievous bodily harm, then and there about to be done him, and that defendant at the time the blow was struck did so believe, and that defendant, so believing, in good faith, for that reason and to protect himself from such danger at the hands of the deceased, if the evidence establishes such danger, struck the blow which killed the deceased, then the defendant would not be guilty.

5.

The court, having refused to give the foregoing instruction, numbered four, as asked, modified the same by striking out of said instruction the following, to wit, the first paragraph of said instructions, being in the following words:

Uncommunicated threats, if proven, may be considered by the jury whenever the evidence is conflicting as to who was the aggressor in the difficulty, and whenever there is uncertainty as

79 to this, as shedding light upon that question, and also in determining the frams of mind which the deceased had and entertained toward the defendant.

And also by striking out of said instruction the last paragraph thereof, being in the following words:

"And if the jury have a reasonable doubt, arising out of the evidence, as to whether or not a reasonable man of ordinary prudence and courage, when situated as was the defendant at the time he struck the fatal blow, would have believed and would have had good reason to believe from the conduct and actions of the deceased, as disclosed by the evidence, at the time the defendant struck the deceased that he was then and there in immediate and imminent danger of the loss of life or grievous bodily harm, then and there about to be done him, and that defendant at the time the blow was struck did so believe, and that defendant, so believing, in good faith, for that reason and to protect himself from that danger at the hands of the deceased, if the evidence establishes such danger, struck the blow which killed the deceased, then the defendant would not be guilty."

Having thus modified the said instruction, the court gave the same in this modified form; to which action of the court in modifying said instruction and giving it as modified the defendant then and there excepted.

The defendant also requested the court to give the following instruction, to wit, No. 5:

"If the jury believe from all the evidence that defendant had in his possession a cow, the property of Ed. Jones, which he declined to give up unless the said Jones established his right to her possession by law; that the deceased in company with his brothers came to defendant's place the morning of the day on which the difficulty occurred; that defendant refused to permit them to take the cow away and told them in substance that they could not get her except by law, and ordered them to leave his premises and not return; that after this there was communicated to the defendant threats which the deceased had previously made against his life; that when defendant returned home he saw the deceased and his brothers within his enclosure endeavoring to get the cow away without his consent; that he then went through his yard and orchard, with a gun which he had with him when he arrived at home, to where deceased was,
not for the purpose of having a difficulty with the deceased
80 or his brothers, but for the purpose of getting them to let the
cow alone and go away from his premises; that deceased and his brothers were requested to go away and let the cow alone, and that instead of doing this a quarrel ensued between them, and the deceased, being a left-handed man, put his left hand on a pistol in his left trousers pocket, and with his hand in that position went toward the defendant in an angry and threatening manner, when defendant was not attempting to harm him, and as he got near the defendant made an overt act as if he then and there intended and designed to shoot defendant, and that the defendant then and there had good grounds to believe from said acts of deceased, and did believe from deceased's acts and conduct, that deceased intended to shoot him, — the defendant in good faith, to prevent this, knocked the deceased down with his gun, then he was under the law justifiable, and the jury should acquit him; and if there arises out of the evidence a reasonable doubt as to whether or not the blow which

killed the deceased was struck under the facts and circumstances as herein set out, then he is entitled to be acquitted."

The court refused to give the said instruction No. 5 as asked, but modified the same by striking out from said instruction the last paragraph thereof, being in the following words, to wit:

"And if there arises out of the evidence a reasonable doubt as to whether or not the blow which killed the deceased was struck under the facts and circumstances as herein above set out, then he is entitled to be acquitted,"

and by inserting in lieu thereof the following words:

"Provided there was no other reasonable means of protecting himself from death or great bodily harm;"

To which action of the court in refusing to give the above instruction as asked the defendant then and there excepted, and to the action of the court in modifying the said instruction as above set out and then giving the same the defendant then and there excepted.

All the above-noted exceptions, both as to the portion of the charges given by the court which were excepted to and the refusal of the court to give the instructions asked by defendant, were separately & severally made before the jury retired and at and during the time the court was instructing the jury.

81–110 Whereupon the jury retired to deliberate, and afterwards returned into court a verdict finding the defendant guilty of manslaughter.

Upon which the defendant, by his attorneys, filed in open court, on the 12th day of July, a motion to set aside the verdict and for a new trial; which motion was by the court overruled, and in overruling the court made the following remarks, to wit:

* * * * * * *

(Omitted in printing per stipulation.)

111 To all of which the defendant at the time excepted. Whereupon the court sentenced the defendant to imprisonment in the Kings County penitentiary for a period of eight years.

To which judgment and sentence of the court the defendant, by his counsel, excepted.

Now comes defendant and tenders this his bill of exceptions, and prays that the same may be signed and made a part of the record in this cause; which is accordingly done.

(Signed) I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court.

(Endorsed on back:) Filed in open court Sept. 18, 1894. Stephen Wheeler, cl'k, by I. M. Dodge, D. C.

112 In the United States Circuit Court for the Western Dist. of Arkansas.

UNITED STATES, Plaintiff,
vs.
BABE BEARD, Defendant. } Manslaughter.

Assignment of Errors.

Now comes the defendont, Babe Beard, by his attorneys, John H. Rogers and Ira D. Oglesby, and for his assignment of errors says—

That in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1.

Because the court erred in instructing the jury as follows:

"You will necessarily want to know whether either one of these propositions of the law of self-defense can be employed because a threat has been made against the life of the defendant, if you believe it has been made. You will want to know whether or not he had a right to assert this law of self-defense because these parties came upon his premises. You will want to know in this case how far the duty devolved upon him to avoid the necessity of taking life—that is, whether or not he was called upon as he was situated to exercise all reasonable means at hand to avoid taking life before he did do it, or whether he could stand, situated as he was upon his own premises, and take life, provided the danger did exist, but that it was danger he could have avoided by the exercise of other means than those resorted to. You must know all these propositions of law in order that you may apply them correctly.

"Now, first, we will give you the two propositions of the law of self-defense: First, the law says, a man who is in the lawful pursuit of his business—that means he was doing what he had a right to do at the time—is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous
113 bodily harm. That is the first proposition. It embraces two things: First, he must be doing what he had a right to do. Then, he must have been attacked by another in a certain way—in such a way as that the circumstances attending that attack would indicate a purpose on the part of the party being made to take his life or to do him great injury that might produce death or great violence upon his person, such as maiming or wounding him in a serious way. These are the first conditions that are required to be found, and if they are in existence he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power."

2.

Because the court erred in instructing the jury as follows:

"Now, let us go over it again that we may make no mistake. A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, upon that proposition we first ascertain from this evidence whether Will Jones was really or apparently about to execute a deadly purpose, and that it was so immediate, real or apparently immediate, so then and there existing that the defendant could not avoid a deadly result that might follow from the act of Jones except by doing as he did do—by taking his life."

3.

Because the court erred in giving this in charge to the jury:

"Now, you may be misled by that without some other explanation is given, and let me explain it to you in the language of a most eminent court, in my judgment—at least, a most eminent judge—who declared what was meant by this doctrine of apparent danger when he said that 'no conception of bare fear could give a party the right to slay, and a man could not be killed upon a state of bare fear, but that there must be something else existing than that.'

"Judge Simrall, of the supreme court of Mississippi, in the 114 case of John Evins *v.* State, 44 Miss., said:

"'To shoot down another on sight and who at the time is making no hostile demonstration dangerous to life and limb, and especially if not prepared and armed so to do, is in law murder. It is murder because the law tolerates no justification and accepts no excuse for the destruction of human life on the plea of self-defense except that the death of the adversary was necessary or apparently so to save his own life or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life or of great personal injury must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life. When we use the term "apparent"—"apparent danger"—we mean such overt actual demonstration by conduct and acts of a design to take life or to do some great personal injury as would make the killing apparently necessary to self-preservation.'"

4.

Because the court erred in charging the jury as follows:

"That is the law; that is what it says; that is what we are to administer here—the best we can and nothing else but that. It says that he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the

intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power."

5.

Because the court instructed the jury as follows:

"Now, a word further upon the proposition I have already adverted to, as to what was his duty at the time. If that danger was real, coming from the hands of Will Jones, or it was apparent as coming from his hands and as affecting this defendant by some overt act at the time, was the defendant called upon to avert that danger by getting out of the way of it if he could? The court says he was. The court tells you that he was. There is but one place where he need not retreat any further, where he need not go away from danger, and that is in his dwelling-house. He may be upon his own premises, and if a man, while so situated and upon his own premises, can do that which would reasonably put aside the danger short of taking life, if he can do that, I say, he is called upon to do so by retreating, by getting out of the way if he can, by avoiding a conflict that may be about to come upon him, and the law says he must do so, and the fact that he is standing upon his own premises away from his own dwelling-house does not take away from him the exercise of that duty of avoiding the danger if he can with a due regard to his own safety by getting away from there or by resorting to some other means of less violence than those resorted to. Now, the rule as applicable to a man of that kind upon his own premises, upon his own property, but outside of his own dwelling-house, is as I have just stated."

115 6.

Because the court erred in instructing the jury as follows:

"Now, right in this connection, if the proof shows there was an act being done by Will Jones of such a character, not the mere fact that he may have had a pistol upon his person, not the mere fact that he may have had his hands in a certain position, but you are to pass upon all these things together as intelligent men to enable you to see whether or not at that time he was doing that really and actually which indicated deadly danger upon his part to this defendant, or apparently so, as evidenced by the facts then being executed by him. If either one of these conditions exist, if that be true, and that is what you are to find first, and then you are to see whether this defendant could have avoided the danger really or apparently existing, and if he could have done so it was his duty to do so. If he could and he did not do so, but took a human life, the life of Will Jones, under such circumstances he would be guilty of manslaughter, because that is a state of case where he would not avoid the danger if he could, and the other case, where he can kill, is a state of case where he could not avoid the danger if he would."

7.

Because the court erred in charging the jury as follows upon uncommunicated threats:

"Now, that is it. When it is a question as to what was deceased's attitude at the time, you can then take into consideration these uncommunicated threats, not that they influenced the mind of the defendant at the time, but you are to take them into consideration as illustrative facts. If the evidence in the case shows a peaceable purpose and you are satisfied of that purpose—it is portrayed by other testimony in the case—then uncommunicated threats pass out of it; they cut no figure at all, because they could not have any influence upon the mind of the defendant, for they have not come to that mind."

8.

Because the court instructed the jury on the law of self-defense as follows:

"But before passing to threats that are called uncommunicated threats I desire to give you the language of Mr. Justice Clifford upon the subject that has been given you already under the second proposition of the law of self-defense—that is to say, the killing of another, and the claim of exemption from punishment upon the doctrine that there was apparent danger; that, really or apparently, danger to life existed. Reading from the dissenting opinion of Mr. Justice Clifford, where there is one of the most able collections of authorities upon this subject to be found anywhere, reported in 93 U. S., 465:

116 "'Unless the party had reasonable ground of apprehension at the time, the bare justification will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time.'

"How just, how humane, and how proper that protection is."

9.

Because the court stated the following to the jury in his charge to them:

"Gentlemen, we were upon the subject of previous communicated threats. I wish to tell you what position they rightfully have in a case as proven facts. I have already told you that a man could not kill because another had made previous threats against him, and I also showed you, as I think, the philosophy of that principle of the law, its wisdom, its justice, and its protecting nature when the rule is properly understood and properly applied, but they do have a position in a case under certain circumstances. They are illustrative facts, and to make them relevant, so that you may consider them at all—that is, threats, now, that were communicated—at the time of the killing, at the time the blow was struck (I mean by "at

that time" just at that moment or immediately previous thereto), the deceased must have been doing some act of an overt character which, when considered in the light of previous threats, would indicate to the mind of the defendant as a reasonable person, situated as he was, that the deceased meant to take his life."

10.

Because the court gave the following instruction:

"Of course there is no contention here as to the lawless and desperate character of the deceased. In fact, the law gives him a good character, as well as it does everybody else, until it is legally and successfully assaulted; but I read this proposition as it is asserted here, and that portion of it which is relevant to this case is in regard to previous threats made by the deceased."

11.

Because the court instructed the jury as follows:

"Now, again, if the threat is uncommunicated, and it is a serious question in your mind as to what was the position of the parties, then you may consider uncommunicated threats to illustrate the position of the parties to enable you to conclude what that position was. If that is not a question, if the evidence you find to be true in the case discloses the condition and position of the parties, then the uncommunicated threats pass out of the case."

117

12.

Because the court instructed the jury as follows:

"Again, attacking another with a deadly weapon. A man is the first aggressor in a deadly way with a deadly weapon. What right has he to set up that condition created by him as one that he can so far act upon as that he can slay because of the attack and be excused in doing it. He cannot, says the law.

Again, going to the place where the person slain is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray. Now, if a man does that, he is in the wrong, and he is cut off from the right of self-defense, no matter what his adversary may do, because the law says in the language of these propositions relating to the law of self-defense that he must avoid taking life if he can with due regard to his own safety. Whenever he can do that he must do it; therefore, if he has an adversary and he knows that there is a bitter feeling, that there is a state of feeling that may precipitate a deadly conflict between himself and his adversary, while he has a right to pursue his usual daily avocations that are right and proper, going about his business, to go and do what is necessary to be done in that way, yet if he knows that condition I have named to exist and he goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray if it comes up, he is there to have it, and he acts for that purpose, the law says there is no self-defense for him.

Again, the use of provoking language or, it seems, resorting to any other device in order to get another to commence an assault so as to have a pretext for taking his life. Agreeing with another to fight him with a deadly weapon. Either one of these cases, if they exist as the facts in this case, puts the case in such an attitude that there is no self-defense in it. If the defendant knew there was a deadly feeling existing between himself and this young man and he could have avoided that by the exercise of due care, it was his duty to do so. If he went to the place where that young man was, armed with a deadly weapon, even if it was upon his own premises, with the purpose of provoking a difficulty with him, in which he might use that deadly weapon, or of having a deadly affray with him, it does not make any difference what was done by the young man, there is no self-defense for the defendant. The law of self-defense does not apply to a case of that kind, because he cannot be the creator of a wrong, of a wrong state of case, and then act upon it. Now, if either one of these conditions exist, I say, the law of self-defense does not apply in this case."

13.

Because the court, after having fully and elaborately instructed the jury upon murder, manslaughter, threats, self-defense, the weight and credit to be given witnesses, then instructed the
118 jury as follows to the prejudice of the defendant, again going over the law applicable to manslaughter:

"If at the time of this killing it be true that the deceased was doing an act of apparent or real deadly violence and that state of case existed, and yet that the defendant at that time could have avoided the necessity of taking his life by the exercise of any reasonable means and he did not do that, because he did not exercise other reasonable means that would have with equal certainty saved his life, but resorted to this dernier remedy, under those facts and circumstances the law says he is guilty of manslaughter. Now, let us see what that requires. It requires, first, that the proof must show that Will Jones was doing an act of violence or about to do it or apparently doing it or about to do it, but that it was an act that the defendant could have escaped from by doing something else other than taking the life of Jones, by getting out of the way of that danger, as he was called upon to do, as I have already told you, for he could not stand there as he could stand in his own dwelling-house, and he must have reasonably sought to avoid that danger before he took the life of Jones, and if he did not do that, if you find that to be Jones' position from this testimony, and he could have done so, but did not do it, the defendant would be guilty of manslaughter when he took the life of Jones, because in that kind of a case the law says that the conduct of Jones would be so provocative as to reduce the grade of the crime; yet, at the same time, it was a state of case that the defendant could have avoided without taking his life, and because he did not do it he is guilty of the crime of manslaughter.

Now, if the defendant was careless and negligent, and for that reason was misled by the facts—but these propositions are given upon the hypothesis and supposition that the defendant was in the right and that this state of case that I have already enumerated actually existed, or there was something exist*ed* that would bring into existence and permit you to believe this second proposition, and that is, that at the time Jones was doing something which really and actually was not of a deadly nature or about to be of a deadly nature, but was conceived to be so by the defendant—making an honest mistake—because he had failed to exercise reasonable care to know the truth, and he was in the right, and Jones was doing something that misguided him, but not of a deadly nature, but the defendant conceived it to be of a deadly nature, and because of this mistake upon his part he took the life of Jones because of that, he is guilty of the crime of manslaughter, because he did not do his duty. His duty was to make that observation under the circumstances that would have enabled him to know the true condition.

Again, if it be true that Will Jones at the time he was killed was exercising deadly violence or about to do so, or apparently exercising it, or apparently about to do so, and the defendant could have paralysed the effect of that violence without taking the life of Jones, but he did not do it, but resorted to this deadly violence when he could have protected his own life without resorting to that dernier remedy—if that be the state of case, the law says he is guilty of manslaughter, because he is doing that which he had no right to do. This great law of self-defense commands him at all times to do that which he can do under the circumstances, to wit, exercise reasonable care to avoid the danger
119 by getting out of the way of it or by exercising less violence than that which will produce death and yet will be equally effective to secure his own life. If either one of these propositions exist, and they must exist to the extent I have defined to you, and the defendant took the life of Jones under these circumstances, the defendant would be guilty of manslaughter."

14.

Because the court erred in instructing the jury as stated in last preceding paragraph, No. 13.

15.

Because the court erred in instructing the jury as follows:

"If the law has been violated by the taking of an innocent human life in a wrongful way or in a criminal way, vindicate and uphold the majesty, the dignity, and supremacy of the law. If it has not been violated by the taking of an innocent life, but, upon the other hand, it was the taking of a guilty life or the life of a man that was seeking the life of the defendant, and that it was a condition from which the defendant could not escape except by doing as he did do, then you are to acquit him."

16.

Because the court erred in instructing the jury as follows:

"Now, if the defendant was careless and negligent, and for that reason was misled by the facts; but these propositions are given upon the hypothesis and supposition that the defendant was in the right, and that this state of case that I have already enumerated actually existed or there was something existed that would bring into existence and permit you to believe this second proposition, and that is, that — the time Jones was doing something which really and actually was not of a deadly nature or about to be of a deadly nature, but was conceived to be so by the defendant making an honest mistake, because he had failed to exercise reasonable care to know the truth, and he was in the right, and Jones was doing something that misguided him, but not of a deadly nature, but the defendant conceived it to be of a deadly nature, and because of this mistake upon his part he took the life of Jones because of that, he is guilty of the crime of manslaughter because he did not do his duty. His duty was to make that observation under the circumstances that would have enabled him to know the true condition."

120 17.

Because the court erred in refusing to give the following instruction asked by defendant:

"The court further instructs the jury that the defendant is never required to prove that he is innocent, and in order for him to be acquitted it is not necessary that the jury should be satisfied in their minds that he is in fact innocent. He is not entitled to be acquitted upon a mere vague conjecture or supposition of innocence, but is whenever there arises out of the evidence a probability that he is innocent. A probability of innocence is always a reasonable doubt of guilt.

This probability of innocence need not be as reasonable as the probability of guilt. In other words, although the theory that he is guilty is more reasonable than the theory that he is innocent, yet if there arises out of the evidence, and there is supported by the evidence, a reasonable theory under which the defendant is probably innocent, then he is entitled to be acquitted."

18.

Because the court erred in refusing to give the following instruction:

"That whenever there arises in the consideration of the case any fact or circumstance capable of two reasonable constructions, one tending to establish guilt and the other innocence, then it is and will be your duty to give it that construction tending to show the innocence of the defendant instead of his guilt, and whenever there is in the mind of the jury a reasonable doubt arising out of the evidence as to any fact or circumstance in the case it will be your duty to solve that doubt in favor of the defendant."

19.

Because the court erred in refusing to give the following instruction:

"The court instructs the jury that if they believe from the evidence that the defendant was where he had the right to be, and that he was not the provoker of nor the aggressor in the difficulty in which deceased lost his life, then the defendant was not required to retreat or flee from any danger, real or apparent, with which the evidence may show he was threatened by the deceased, but under the law he had the right to stand his ground and to meet force with force sufficient to overcome his adversary, even to the extent
of killing him if the evidence shows it was necessary or
121 would have been deemed necessary by a man of ordinary
prudence and courage to do this in order to save himself from the real or apparent danger of the loss of life or grievous bodily harm then and there about to be done him by his adversary."

20.

Because the court refused to give the following instruction asked by defendant—No. 3:

"Uncommunicated threats, if proven, may be considered by the jury whenever the evidence is conflicting as to who was the aggressor in the difficulty, and whenever there is uncertainty as to this, as shedding light upon that question, and also in determining the frame of mind which the deceased had and entertained towards the defendant.

"Communicated threats, if proven, may be considered by the jury for the purposes of determining the question as to whether or not the acts and conduct of the deceased at the time of the killing were such as would lead a man of ordinary courage and prudence, situated as was defendant, to believe that the deceased then and there designed to kill him or to do him some great bodily harm, and whether or not there was imminent and impending danger, real or apparent, of such design being then and there accomplished. In determining this question the jury should not give the defendant the benefit of needlessly exaggerated fears. He is not entitled to be acquitted upon the mere fear or apprehension of danger, however honestly and sincerely entertained, if there was no overt act upon the part of the deceased evincing a present design or intention then
and there to kill him or to do him some great bodily harm,
122 and if there was no imminent danger, real or apparent, of
such design being then and there immediately accomplished.

But they should not try him by the light of subsequently developed facts, nor require of him the same cool and correct judgment which they can now bring to bear upon the occurrence. They should put themselves as far as possible in the place of the defendant and judge of his acts and conduct at the time he struck the fatal blow as they would of the acts and conduct of a man of ordinary courage and prudence situated as was defendant. And

if the jury have a reasonable doubt, arising out of the evidence, as to whether or not a reasonable man of ordinary prudence and courage, when situated as was defendant at the time he struck the fatal blow, would have believed and would have had good reason to believe from the conduct and actions of deceased, as disclosed by the evidence, at the time the defendant struck the deceased that he was then and there in immediate and imminent danger of the loss of life or grievous bodily harm, then and there about to be done him, and that defendant at the time the blow was struck did so believe, and that defendant, so believing, in good faith, for that reason and to protect himself from such danger at the hands of the deceased (if the evidence established such danger), struck the blow which killed the deceased, then the defendant would not be guilty."

21.

Because the court modified the last-named instruction by striking out the following part of said instruction, to wit:

" Uncommunicated threats, if proven, may be considered by the jury whenever the evidence is conflicting as to who was the aggressor in the difficulty, and whenever there is uncertainty as
123 to this, as shedding light upon that question, and also in determining the frame of mind which the deceased had and entertained toward the defendant.

"And if the jury have a reasonable doubt, arising out of the evidence, as to whether or not a reasonable man of ordinary prudence and courage, when situated as was defendant at the time he struck the fatal blow, would have believed and would have had good reason to believe from the conduct and action of the deceased, as disclosed by the evidence, at the time the defendant struck the deceased that he was then and there in immediate and imminent danger of the loss of life or grievous bodily harm, then and there about to be done him, and that defendant at the time the blow was struck did so believe, and that defendant, so believing, in good faith, for that reason and to protect himself from that danger at the hands of the deceased, if the evidence establishes such danger, struck the blow which killed the deceased, then the defendant would not be guilty."

22.

Because the court erred in refusing to give instruction No. 4 as asked by defendant, which instruction is as follows:

" If the jury believe from all the evidence that defendant had in his possession a cow, the property of Ed. Jones, which he declined to give up unless the said Jones established his right to her possession by law; that the deceased in company with his brothers came to defendant's place the morning of the day on which the difficulty occurred; that defendant refused to permit them to take the cow away and told them in substance that they could not get her except by law, and ordered them to leave his premises and not
124 return; that after this there was communicated to the defend-

ant threats which the deceased had previously made against his life; that when the defendant returned home he saw the deceased and his brothers within his enclosure endeavoring to get the cow away without his consent; that he then went through his yard and orchard with a gun which he had with him when he arrived at home, to where deceased was, not for the purpose of having a difficulty with deceased or his brothers, but for the purpose of getting them to let the cow alone and go away from his premises; that deceased and his brothers were requested to go away and let the cow alone, and that instead of doing this a quarrel ensued between them, and the deceased, being a left-handed man, put his left hand on a pistol in his left trouser pocket and with his hand in that position went towards defendant in an angry and threatening manner when defendant was not attempting to harm him, and as he got near the defendant made an overt act as if he then and there intended and designed to shoot the defendant, and that the defendant then and there had good grounds to believe from said acts of deceased and did believe from deceased's act and conduct that deceased intended to shoot him, and defendant in good faith to prevent this knocked the deceased down with his gun, then he was under the law justifiable, and the jury should acquit him; and if there arises out of the evidence a reasonable doubt as to whether or not the blow which killed the deceased was struck under the facts and circumstances as herein set out, then he is entitled to be acquitted."

23.

Because the court erred in inserting in said last instruction the following words, to wit:

"Provided there was no other reasonable means of protecting himself from death or great bodily harm,"

And striking out from said instruction the following, to wit:

125 "And if there arises out of the evidence a reasonable doubt as to whether or not the blow which killed the deceased was struck under the facts and circumstances as hereinabove set out, then he is entitled to be acquitted."

24.

Because the court erred in instructing the jury as follows:

"If a killing is done where there is no malice aforethought as I have defined it, if it is done where there is no case of self-defense, it is unlawful; if it is voluntarily done, or done wilfully, as I have defined the expression wilful, then it is necessarily a case where there is manslaughter. Now, in connection with the law of self-defense I will give you some other propositions presently which will show you what sort of a case under the law will make manslaughter. The law contemplates, when it goes to admeasure this crime, that it is one that grows out of a condition where upon sudden quarrel two persons meet and engage in an affray, or meet and fight, and one of them kills the other, this is voluntary manslaughter; so the

law says if they upon such occasion go out and fight in a field, as this is one continued act of passion."

J. H. ROGERS AND
IRA D. OGLESBY,
Attys' for Defendant.

Endorsed: Filed Sept. 29th. 1894. S. W. Wheeler, clerk, by I. M. Dodge, D. C.

126 UNITED STATES
vs.
BABE BEARD. } Petition for Writ of Error.

Babe Beard, defendant in above-styled cause, prays that a writ of error be allowed him in said cause, in which he has been convicted of manslaughter and sentenced to the penitentiary for a period of eight years, directed to the clerk of the circuit court in and for the western district of Arkansas, to send the record and proceedings in said cause, with all things concerning the same, to the clerk of the Supreme Court of the United States, in order that the errors complained of in his assignment of errors heretofore filed in said circuit court may be reviewed by said court and, if errors are found, corrected according to the laws of the United States; and he further prays that supersedeas be granted staying the execution of said sentence and judgment until this cause is heard by the Supreme Court of the United States, and until the said cause is heard and determined by the said court that bail be granted him.

In support of this petition he states that the evidence on the part of the said defendant on the trial of said cause in the said circuit court for the western district of Arkansas tended to show the following facts:

That deceased, a short while before the difficulty in which he lost his life, repeatedly threatened to take the life of defendant and threatened to go to defendant's premises and take therefrom a cow and to kill the defendant if any attempt was made to prevent him from getting the said cow, and that deceased was at this time armed with a pistol and carrying it.

127 On the morning preceding the difficulty with the deceased in the afternoon some of these threats were communicated to defendant; others were not communicated.

The evidence further tended to show that a few days after making these threats deceased came to defendant's premises, entered his enclosure for the purpose of driving away said cow, and on being requested by defendant, who was at this time in his own yard and orchard, about 60 yards from his house, to leave the premises, deceased instead of doing so turned and advanced on defendant in an angry and threatening manner, being at the time armed with a pistol, and when within a few yards of defendant, having his hand upon his pistol, attempted to draw it and to shoot defendant, who at this time was doing nothing towards deceased, when defendant, to prevent being shot by deceased and to save his own life, and for that reason only, knocked deceased down with a gun which he held

in his hand and immediately disarmed deceased by taking out of his hand and pocket a pistol with which deceased had attempted to shoot. Defendant's gun was loaded, but no attempt was made to shoot deceased or to harm him in any way after he was disabled by the blow which was struck by defendant when deceased was in the act of drawing his pistol to shoot defendant.

The evidence further established that the defendant's general reputation was that of a law-abiding, peaceable man.

On the trial the defendant requested the court to instruct the jury that if the deceased was killed under the facts and circumstances hereinabove set out, that such killing was justifiable, which instruction was by the court refused; but the court instructed the
128 jury in substance that under this state of facts it was the duty of defendant to retreat before defending himself, notwithstanding he was upon his own premises and in his own yard and enclosure.

The court further instructed the jury, without any qualification and without regard to the nature of the attack or character of the weapon with which deceased was armed and which he was about to use, that it was the duty of the defendant to retreat, if it was in his power to do so, before striking deceased.

The court repeatedly in its instructions to the jury told them it was the duty of the defendant to retreat, without at any time instructing them under what circumstances he would not be required to retreat; but the court pressed upon the jury the duty of the defendant to retreat without regard to the nature of the attack made upon him by the deceased, the character of the weapon with which he was armed, or the proximity of the deceased to defendant when struck by defendant.

The court refused to instruct the jury that if defendant was where he had a right to be, and neither the provoker of nor the aggressor in the difficulty, that he had the right to stand his ground and to resist force by force, even to the extent of killing his adversary if it was necessary to do so in order to save his own life.

The court instructed the jury that they should not consider the uncommunicated threats made by deceased, if from the other evidence in the case the attitude of the parties was shown.

And further instructed the jury that such threats should not be considered by the jury, and that they must pass out of the case and not be considered for any purpose, unless it was a serious
129 question in their minds as to what was the position of the parties.

The court, in its instruction to the jury, stated to them that no killing was justifiable "if there be no actual danger at the time."

The court, in its instruction to the jury, gave instructions upon abstract propositions not supported by any evidence in the case, which instructions were greatly prejudicial to the defendant.

The court refused to instruct the jury that he was entitled to be acquitted if, from all the evidence, there was a probability that he was innocent, and refused to instruct the jury that if any fact or circumstance was capable of two reasonable constructions, one tend-

ing to establish guilt and the other innocence, that it was their duty to give such facts and circumstances that construction which tended to show innocence instead of guilt.

Petitioner further states that the court committed many other grievous errors, both in the instructions given and those refused, all of which will be shown by his assignment of errors herewith filed.

Proper exceptions were reserved by defendant to the instructions given and to the instructions refused by the court which were asked by defendant.

JNO. H. ROGERS,
IRA D. OGLESBY,
Att'ys for Deft.

(Endorsed on back:) Filed Oct. 26, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

130 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States, plaintiff, and Babe Beard, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the 22d day of October, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

130½ UNITED STATES OF AMERICA, }
Western Dist. of Arkansas. }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the circuit court of the United States in and for the western dist. of Arkansas.

[The Seal of the Circuit Court, Western District of Ark., U. S. A.]

STEPHEN WHEELER, *Clk*,
By I. M. DODGE, *D. C.*

131 Know all men by these presents that we, Babe Beard, as principal, and John G. Beard, Wm. J. Edwards, William A. Lewis, Joseph H. Mahan, David F. Lewis, John H. Coffee, Isaiah Coffee, George F. Martin, James E. Reynolds, as sureties, are held and firmly bound unto the United States of America in the sum of five thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of Oct., 1894.

The condition of this obligation is such that whereas, on the 21st day of Aug., 1894, by the consideration of the United States circuit court for the western district of Arkansas, in a certain criminal cause, to wit, a certain indictment against the above-named Babe Beard for the crime of murder (being criminal cause No. 84 in that court), the said Babe Beard was convicted of manslaughter and was adjudged and sentenced to imprisonment in the penitentiary at Brooklyn, N. Y., for a period of eight years, and to pay a fine of $500.00; and whereas, upon a petition of the said Babe Beard, the Hon. *Josiah* Brewer, one of the judges of the Supreme Court of the U. S. of America, and who has been assigned to the district in which is embraced the U. S. circuit court for the western district of Arkansas, has allowed a writ of error from the said circuit court to the Supreme Court of the U. S. of America upon the judgment and sentence aforesaid, and has ordered that such writ of error operate as a stay of proceedings under the said judgment and sentence, and that the said Babe Beard be admitted to bail in that behalf

132 in the sum of five thousand dollars above mentioned; and whereas the said writ of error has issued accordingly and the citation in that behalf has been issued:

Now, if the said Babe Beard shall, in case the judgment and sentence aforesaid is affirmed, surrender himself to the custody of the marshal of the United States for the western district of Arkansas aforesaid, to serve, undergo, and perform such judgment and sentence as has already been rendered against him if the judgment and sentence of the said circuit court of the United States for the western district of Arkansas is affirmed, or if such sentence and judgment is by the said Supreme Court of the U. S. of America re-

versed the said Babe Beard shall personally appear before the said circuit court of the western district of Arkansas from day to day and term to term to answer the said indictment herein and to remain until finally discharged, then this obligation shall be void, and otherwise shall remain in full force.

Witness our hands and seals this 19th day of Oct., 1894.

BABE BEARD.
I. COFFEE.
JOHN G. BEARD.
G. F. MARTIN.
J. H. MAHAN.
J. H. COFFEE.
WM. J. EDWARDS.
JAMES E. REYNOLDS.
W. A. LEWIS.
D. F. LEWIS.

I regard this bond as good for the penalty thereof.

STEPHEN WHEELER,
U. S. Commissioner, West. Dist. Ark.

GEORGE J. CRUMP,
U. S. Marshal.

133 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

We, the undersigned, sureties on bond affixed, do solemnly swear that we are residents of the western district of Arkansas and worth in our own right, over and above all *my* debts and liabilities and the property exempt by law from execution, the sum opposite our respective names, to wit:

W. J. Edwards,	the sum of	$500 00
G. F. Martin,	" "	$400 00
W. A. Lewis,	" "	$400 00
J. H. Mahan,	" "	$200 00
D. F. Lewis,	" "	$300 00
J. H. Coffee,	" "	$300 00
Jno. G. Beard,	" "	$1,000 00
I. Coffee,	" "	$500 00
James E. Reynolds,	" "	$3,000 00

J. H. COFFEE.
WM. J. EDWARDS.
W. A. LEWIS.
D. F. LEWIS.
I. COFFEE.
JAMES E. REYNOLDS.
G. F. MARTIN.
J. H. MAHAN.
JOHN G. BEARD.

Subscribed and sworn to, at Fort Smith, Ark., this 19 day of Oct., 1894.

STEPHEN WHEELER,
United States Commissioner.

Approved Oct. 22, 1894.

DAVID J. BREWER,
Associate Justice Supreme Court U. S.

(Endorsed on back:) Filed Oct. 26, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

134 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To The United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Babe Beard is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 22nd day of October, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

(Endorsed on back:) Service of the within citation is this day accepted, a copy hereof having this day been delivered to me, and any further service is this day waived. All at Ft. Smith, western district Arkansas, this 26 day of Oct., 1894. United States, def'ts in error, by Jas. F. Read, U. S. att'y for west. dist. of Ark. Filed Oct. 26, 1894. S. Wheeler, clerk, by I. M. Dodge, D. C.

135 UNITED STATES OF AMERICA, }
Western District of Arkansas, }

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript annexed to this certificate is a true and complete copy of the record in the case of U. S. *vs.* Babe Beard, the original of which remains of record in my office.

The Seal of the Circuit Court, Western District of Ark., U. S. A.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 28 day of Oct., A. D. 1894.

S. WHEELER, *Clerk,*
By I. M. DODGE, *D. C.*

136 *Stipulation.*

In the Supreme Court of the United States, October Term, 1894.

BABE BEARD, Plaintiff in Error,
vs.
THE UNITED STATES. } No. 842.

At the request of the counsel for the plaintiff in error and in order to avoid unnecessary expense in printing, it is agreed that the opinion of the court below on the motion for a new trial may be omitted in the printing of the transcript of the record, to wit, from page 82 to page 110, inclusive.

JOHN H. ROGERS,
Counsel for Plaintiff in Error.
LAWRENCE MAXWELL, JR.,
Solicitor General.

Dated December 3, 1894.

137 [Endorsed:] Case No. 15,726. Supreme Court U. S., October term, 1894. Term No., 842. Babe Beard, pl'ff in error, *vs.* The United States. Stipulation to omit parts of record in printing. Office Supreme Court U. S. Filed Dec. 10, 1894. James H. McKenney, clerk.

Endorsed on cover: Case No. 15,726. W. Arkansas C. C. U. S. Term No., 842. Babe Beard, plaintiff in error, *vs.* The United States. Filed November 13, 1894.

Clerk Supreme Court, U. S.
FILED
JAN 28 1895
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

BABE BEARD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 812.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

BABE BEARD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 842.

MOTION TO ADVANCE.

This is a writ of error to a judgment of the circuit court of the United States for the western district of Arkansas, sentencing the plaintiff in error to imprisonment for eight years in the Kings County penitentiary and to pay a fine of $500 and costs, on a conviction of manslaughter in killing one Will Jones, at the Choctaw Nation, in the Indian country. The plaintiff in error has been admitted to bail in the sum of $5,000, pending the decision of this court.

In accordance with section 3 of rule 26, the Solicitor-General respectfully moves the court to advance the case upon the docket, and set it down for hearing at such time during the present term as may be convenient to the court.

11438

Notice of this motion has been served on counsel for the plaintiff in error and proof thereof filed with the clerk.

LAWRENCE MAXWELL, Jr.,
Solicitor-General.

Office Supreme Court, U. S.
FILED.
FEB 25 1895
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

BABE BEARD, *Plaintiff in Error*,

vs. No. 842.

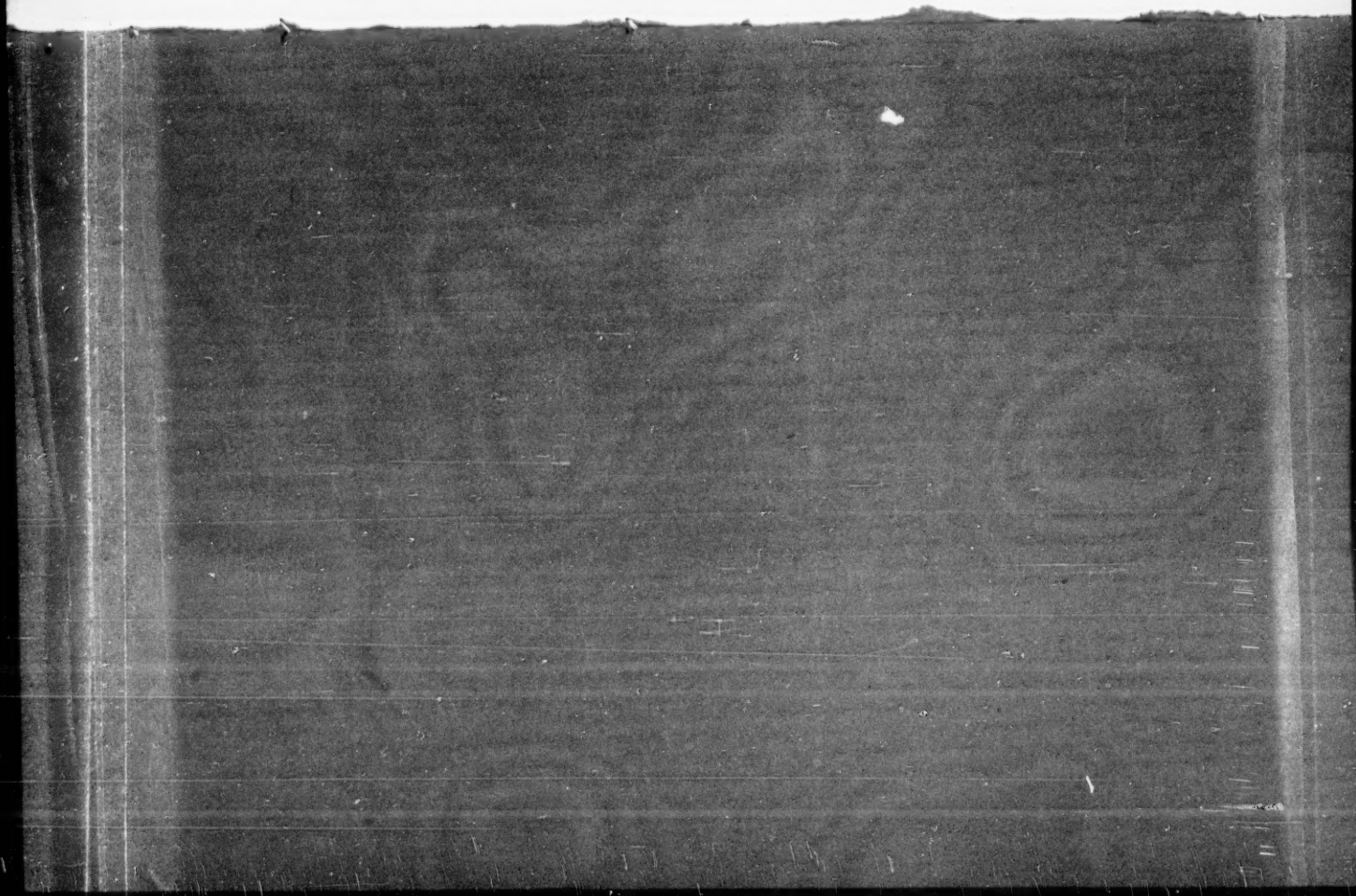
THE UNITED STATES. *Defendant in Error.*

Error to the Circuit Court of the United States for the Western District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN H. ROGERS,
IRA. D. OGLESBY,
Attorneys for Plaintiff in Error.

FORT SMITH ELEVATOR PRINT.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

BABE BEARD, *Plaintiff in Error*,

vs. No. 842.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The following facts are disclosed by the record: At the time of the homicide, the plaintiff in error lived on his farm, a few miles from Cameron Station, Indian Territory. Ed Jones, a brother of Wm. Jones, who was killed by plaintiff in error, had been, at his mother's death, placed under the care and in custody of the plaintiff in error, whose wife was the aunt of the said Ed Jones, and of the deceased, Wm. Jones. At the time

plaintiff in error took charge of Ed it was agreed that he should keep him until grown, as one of his own children, and was to have and deal with a yearling that was allotted to Ed as his own. (R. p. 12.) At this time Ed Jones was not large enough to do much work, was poorly clad, and in bad physical condition. (R. p. 15.) He remained with plaintiff in error until November previous to the homicide in December, when he was decoyed off by Wm. Jones, the deceased. Ed at this time had about arrived at an age when he could be of some service to plaintiff in error. (R. p. 12.)

The cow, or yearling, when Ed went away, was left in possession of plaintiff in error. On the morning of the homicide, Ed Jones, his brother, John Jones, and the deceased brother, Wm. Jones, went to the premises of plaintiff in error, one of them being armed with a shotgun, and endeavored to carry away the cow without his consent, and over his protest. He declined to give the cow up to them, because he believed he had the right to retain her. (R. p. 12.) He told them to leave his premises and not to return; that if they desired to get the cow to resort to lawful means to do so, and if they were entitled to her possession under the law, they should have her and he would pay all costs, and for them not to return without bringing an officer with them. (R. pp. 7 and 12.)

The three brothers then left the premises. The plaintiff in error, some time during that day, and after the deceased and his brothers had gone away, went to Cameron, a town a few

miles distant, and as was his usual custom, carried his gun with him. (R. p. 8.) While at Cameron that day he was informed by John Winters and Wm. Byers that the deceased, Wm. Jones, had made threats against his life, and had said he intended to have the cow or kill him. (R. pp. 11, 12.) And that deceased was armed. (R. p. 13.)

When he returned home that day he saw deceased and his brothers inside of his field in about fifty or sixty steps from his house, and near his yard, attempting to drive away the calf of the cow in controversy, while his wife was endeavoring to prevent it. He dismounted and went to where they were, remaining, however, within his yard and orchard, and within about fifty steps from his house, and called to Mrs. Pounds (a neighbor) who was near by, to come there and hear what he had to say to these parties. (R. pp. 8–13.) He then told them in the presence of Mrs. Pounds to leave his premises and to let the cow alone. This was all he said, and he did nothing to provoke a difficulty with deceased. (R. pp. 8–13.)

The deceased, who was a left-handed man, and who at that time had in his left trousers pocket a self-acting, five-shooting pistol' instead of going out of the field and off of the premises when requested to do so, immediately advanced upon plaintiff in error with his left hand in or about his left trousers pocket. These facts are established by Mrs. Pounds, the only disinterested witness for the government (R. p. 8).

The testimony of the government's witnesses tends to show

that when the deceased got to the fence at which plaintiff in error was standing, he stopped and stood there a few minutes before he was struck, but none of them were able to state a word that was said by the parties after he reached the fence, although only a few feet from them, nor were they able to state the position of deceased's left hand when he was struck.

The testimony introduced on behalf of plaintiff in error was to this effect: That he was a law-abiding, peaceable man, and that such was his general reputation in the neighborhood in which he lived (R. p. 15); that the deceased, a few days before the homicide, had gone to Fort Smith, Ark., and while there purchased pistol cartridges, saying "He might need them" (R. p. 11); that both before and after getting these cartridges the deceased had made frequent threats against the life of plaintiff in error, saying: "I am going to get the cow or kill Babe Beard," "that he expected to have trouble with Mr. Beard, but he aimed to have the cow at the risk of his life." "I am going over there and have one of those cows or kill Babe Beard" (R. p. 10–11). Some of these threats were communicated to Beard when at Cameron, a few hours before the killing; the others were not communicated to him. The plaintiff in error knew that the deceased was left-handed and that he used his left hand to shoot a pistol (R. p. 14). When he arrived at home from Cameron and saw the deceased and his brothers inside of his inclosure, again endeavoring to take away the cow and calf, he went into his yard and orchard to where they were,

and in the presence of Mrs. Pounds whom he had called to hear what he had to say, requested them to leave his premises and to let the cow alone (R. p. 8–13). This was all he said to him and did nothing to provoke any difficulty. The deceased, who was only a short distance from him, instead of leaving as requested, immediately advanced towards him, and as he approached, plaintiff in error told him to stop; deceased did not do so but continued to advance and plaintiff in error said to him, "What are you going to do?" to which, deceased, who had his left hand in his left trousers pocket, replied, "Damn you, I will show you," and at the same time attempted to draw a pistol with which to shoot plaintiff in error, who, believing from this demonstration, in connection with deceased's threats that he intended to kill him, struck deceased with his gun to prevent being shot; his gun was loaded and he could have shot deceased but did not wish to do so, as he thought he could knock him down and disarm him. As soon as he struck deceased he jumped over the fence, which was between them, and which was about three feet high, and took away from the deceased his pistol. The deceased's left hand was in his left trousers pocket and on the pistol when he was disarmed. Plaintiff in error made no attempt to shoot or hurt deceased after striking him, although he had every opportunity to do so. He saw that medical attention was given the deceased. (R. p. 13–14.)

The government proved by one of its witnesses that he advised plaintiff in error to leave until the extent of deceased's

injury could be ascertained, but he declined to do so, stating that while he was sorry of the occurrence he had only acted in self defense (R. p. 10). The proof shows that the deceased was between twenty and twenty-one years of age and was about the size of plaintiff in error (R. p. 8–14). The plaintiff in error at the time of the difficulty, and when he struck the deceased, was inside his yard and orchard (all one inclosure), about 50 or 60 steps from his residence, and there is no evidence establishing that he brought on or provoked the difficulty in which deceased was killed.

SPECIFICATION OF ERRORS.

The plaintiff in error relies upon the following errors committed by the court below, to-wit:

I.

Because the court erred in instructing the jury as follows:

"You will necessarily want to know whether either one of these propositions of the law of self-defense can be employed because a threat has been made against the life of the defendant, if you believe it has been made. You will want to know whether or not he had a right to assert this law of self-defense because these parties came upon his premises. You will want to know in this case how far the duty devolved upon him to avoid the necessity of taking life—that is, whether or not he was called upon as he was situated to exercise all reasonable means at hand to avoid taking life before he did do it, or whether he could stand situated as he was, upon his own prem-

ises, and take life, provided the danger did exist, but that it was danger he could have avoided by the exercise of other means than those resorted to. You must know all these propositions of law in order that you may apply them correctly.

"Now, first, we will give you the two propositions of the law of self-defense: First, the law says a man who is in the lawful pursuit of his business—that means he was doing what he had a right to do at the time—is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm. That is the first proposition. It embraces two things: First, he must be doing what he had a right to do. Then, he must have been attacked by another in a certain way—in such a way as that the circumstances attending the attack would indicate a purpose on the part of the party being made to take his life or to do him great injury that might produce death or great violence upon his person, such as maiming or wounding him in a serious way. These are the first conditions that are required to be found, and if they are in existence he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power." (R. pp. 18 and 19.)

II.

Because the court erred in instructing the jury as follows:

"Now, let us go over it again that we may make no mistake. A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm may lawfully kill the assailant, provided he use all the means in his power to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adver-

sary without killing him, if it be in his power. Now, upon that proposition we first ascertain from this evidence whether Will Jones was really or apparently about to execute *a deadly purpose*, and that it was so immediate, real or apparently immediate, so then and there existing that the defendant could not avoid a *deadly* result that might follow from the act of Jones except by doing as he did do—by taking his life." (R. pp. 19 and 20.)

III.

Because the court erred in giving this in charge to the jury:

"The danger to life or of great personal injury must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no reasonable mode of escape except to take life." (R. p. 21.)

IV.

Because the court erred in charging the jury as follows:

"That is the law; that is what it says; that is what we are to administer here—the best we can and nothing else but that. It says that he may lawfully kill the assailant provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power." (R p. 21–22.)

V.

Because the court instructed the jury as follows:

"Now, a word further upon the proposition I have already adverted to, as to what was his duty at the time. If that danger was real, coming from the hands of Will Jones, or it was apparent as coming from his hands and as affecting this defendant by some overt act at the time, was the defendant called upon

to avert the danger by getting out of the way of it if he could? The court *says he was. The court tells you that he was.* There is but one place where he need not retreat any further, where he need not go away from danger, and that is in his dwelling house. He may be upon his own premises, and if a man while so situated and upon his own premises, can do that which would reasonably put aside the danger short of taking life, if he can do that, I say, he is called upon to do so by retreating, by getting out of the way if he can, by avoiding a conflict that may be about to come upon him, and the law says he must do so, and the fact that he is standing upon his own premises away from his own dwelling house does not take away from him the exercise of that duty of avoiding the danger if he can with a due regard to his own safety by getting away from there or by resorting to some other means of less violence than those resorted to. Now, the rule as applicable to a man of that kind upon his own premises, upon his own property, but outside of his own dwelling house, is as I have just stated." (R. p. 23 and 24.)

VI.

Because the court erred in instructing the jury as follows:

"Now, right in this connection, if the proof shows there was an act being done by Will Jones of such a character, not the mere fact that he may have had a pistol upon his person, not the mere fact that he may have had his hands in a certain position, but you are to pass upon all these things together as intelligent men, to enable you to see whether or not at that time he was doing that really and actually which indicated *deadly danger* upon his part to this defendant, or apparently so, as evidenced by the facts then being executed by him. If either one of these conditions exist, if that be true, and that is what you are to find first, and then you are to see whether this defendant could have avoided the danger really or apparently existing, and if

he could have done so it was his duty to do so. If he could and he did not do so, but took a human life, the life of Will Jones, under such circumstances, he would be guilty of manslaughter, because that is a state of case where he would not avoid the danger if he could, and the other case, where he can kill, is a state of case where he could not avoid the danger if he would." (R. p. 24 and 25.)

VII.

Because the court erred in charging the jury as follows upon uncommunicated threats:

"Now, that is it. When it is a question as to what was deceased's attitude at the time, you can then take into consideration these uncommunicated threats, not that they influenced the mind of the defendant at the time, but you are to take them into consideration as illustrative facts. If the evidence in the case shows a peaceable purpose and you are satisfied of that purpose—it is portrayed by other testimony in the case—then uncommunicated threats pass out of it; they cut no figure at all, because they could not have had any influence upon the mind of the defendant, for they have not come to that mind." (R. p. 26.)

VIII.

Because the court instructed the jury on the law of self-defense as follows:

"But before passing to threats that are called uncommunicated threats I desire to give you the language of Mr. Justice Clifford upon the subject that has been given you already under the second proposition of the law of self-defense—that is to say, the killing of another and the claim of exemption from punish-

ment upon the doctrine that there was apparent danger; that really or apparently danger to life existed. Reading from the dissenting opinion of Mr. Justice Clifford, where there is one of the most able collections of authorities upon this subject to be found anywhere, reported in 93 U. S., 465:

"Unless the party had reasonable ground of apprehension at the time, the bare justification will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time."

"How just, how humane and how proper that protection is." (R. p. 26.)

IX.

Because the court stated the following to the jury in his charge to them:

"Gentlemen, we were upon the subject of previous communicated threats. I wish to tell you what position they rightfully have in a case as proven facts. I have already told you that a man could not kill because another had made previous threats against him, and I also showed you, as I think, the philosophy of that principle of the law, its wisdom, its justice, and its protecting nature when the rule is properly understood and properly applied; but they do have a position in a case under certain circumstances. They are illustrative facts, and to make them relevant, so that you may consider them at all—that is, threats, now, that were communicated—at the time of the killing, at the time the blow was struck (I mean by "at that time" just at that moment, or immediately previous thereto) the deceased must have been doing some act of an overt character, which, when considered in the light of previous threats, would indicate to the mind of the defendant as a reasonable person,

situated as he was, that the deceased *meant to take his life.*" (R. pp. 26 and 27.)

X.

Because the court gave the following instruction:

"Of course there is no contention here as to the lawless and desperate character of the deceased. In fact, the law gives him a good character, as well as it does everybody else, until it is legally and successfully assaulted; but I read this proposition as it is asserted here, and that portion of it which is relevant to this case is in regard to previous threats made by the deceased." (R. p. 27.)

XI.

Because the court instructed the jury as follows:

"Now, again, if the threat is uncommunicated, and it is a serious question in your mind as to what was the position of the parties, then you may consider uncommunicated threats to illustrate the position of the parties to enable you to conclude what that position was. If that is not a question, if the evidence you find to be true in the case discloses the condition and position of the parties, then the uncommunicated threats pass out of the case." (R. p. 27.)

XII.

Because the court instructed the jury as follows:

"Again, attacking another with a deadly weapon. A man is the first aggressor in a deadly way with a deadly weapon. What right has he to set up that condition created by him as one that he can so far act upon as that he can slay because of the attack and be excused in doing it. He cannot, says the law.

"Again, going to the place where the person slain is with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray. Now, if a man does that, he is in the wrong, and he is cut off from the right of self-defense, *no matter* what his adversary may do, because the law says in the language of these propositions relating to the law of self-defense that he must avoid taking life if he can with due regard to his own safety. Whenever he can do that, he must do it. Therefore, if he has an adversary and he knows that there is a bitter feeling, that there is a state of feeling that may precipitate a deadly conflict between himself and his adversary, while he has a right to pursue his usual daily avocations that are right and proper, going about his business, to go and do what is necessary to be done in that way, yet if he knows that condition I have named to exist, and he goes to the place where the slain person is with a deadly weapon, for the purpose of provoking a difficuly, or with the intent of having an affray if it comes up, he is there to have it, and he acts for that purpose, the law says there is no self-defense for him."

"Again, the use of provoking language or, it seems, resorting to any other device in order to get another to commence an assault so as to have a pretext for taking his life. Agreeing with another to fight him with a deadly weapon. Either one of these cases, if they exist as the facts in this case, puts the case in such an attitude that there is no self-defense in it. If the defendant knew there was a deadly feeling existing between himself and this young man and he could have avoided that by the exercise of due care, it was his duty to do so. If he went to the place where that young man was, armed with a deadly weapon, even if it was upon his own premises, with the purpose of provoking a difficulty with him, in which he might use that deadly weapon, or of having a deadly affray with him, it does not make any difference what was done by the young man, there is no self-defense for the defendant. The law of self-defense does not

apply to a case of that kind, because he cannot be the creator of a wrong—of a wrong state of case—and then act upon it. Now, if either one of these conditions exist, I say, the law of self-defense does not apply in this case." (R. p. 29 and 30.)

XIII.

Because the court, after having fully and elaborately instructed the jury upon murder, manslaughter, threats, self-defense, the weight and credit to be given witnesses, then instructed the jury as follows to the prejudice of the defendant:

"If at the time of the killing it be true that the deceased was doing an act of apparent or *real deadly violence*, and that state of case existed, and yet that the defendant at that time could have avoided the necessity of taking his life by the exercise of any reasonable means and he did not do that, because he did not exercise other reasonable means that would have with equal certainty saved his life, but resorted to this dernier remedy, under those facts and circumstances the law says he is guilty of manslaughter. Now let us see what that requires. It requires, first, that the proof must show that Will Jones was doing an act of violence or about to do it, or apparently doing it or about to do it, but that it was an act that the defendant could have *escaped* from by doing something else other than by taking the life of Jones; by getting out of the way of that danger, as he was called upon to do, as I have already told you; for he could not stand there as he could stand in his own dwelling house, and he must have reasonably sought to avoid that danger before he took the life of Jones, and if he did not do that, if you find that to be Jones' position from this testimony, and he could have done so, but did not do it, the defendant would be guilty of manslaughter when he took the life of Jones; because in that kind of a case the law says that the conduct of Jones would be so provocative as to reduce the

grade of the crime; yet, at the same time, it was a state of case that the defendant could have avoided without taking his life, and because he did not do it he is guilty of the crime of manslaughter.

"Now, if the defendant was careless and negligent, and for that reason was mislead by the facts—but these propositions are given upon the hypothesis and supposition that the defendant was in the right, and that this state of case that I have already enumerated actually existed, or there was something existed that would bring into existence and permit you to believe this second proposition, and that is, that at the time Jones was doing something which really and actually was not of a deadly nature or about to be of a deadly nature, but was conceived to be so by the defendant—making an honest mistake—because he had failed to exercise reasonable care to know the truth, and he was in the right, and Jones was doing something that misguided him, but not of a deadly nature but the defendant conceived it to be of a *deadly nature* and because of this mistake upon his part he took the life of Jones, he is guilty of the crime of manslaughter, because he did not do his duty. His duty was to make that observation under the circumstances that would have enabled him to know the true condition.

"Again, if it be true that Will Jones at the time he was killed was exercising deadly violence or about to do so, or apparently exercising it, or apparently about to do so, and the defendant could have paralyzed the effect of that violence without taking the life of Jones, but he did not do it, but resorted to this deadly violence when he could have protected his own life without resorting to that dernier remedy—if that be the state of case, the law says he is guilty of manslaughter, because he is doing that which he had no right to do. This great law of self-defense commands him at all times to do that which he can do

under the circumstances, to-wit: exercise reasonable care to avoid the danger by getting out of the way of it, or by exercising less violence than that which will produce death and yet will be equally effective to secure his own life. If either one of these propositions exist, and they must exist to the extent I have defined to you, and the defendant took the life of Jones under these circumstances, the defendant would be guilty of manslaughter." (R. p. 35 and 36.)

XIV.

Because the court erred in instructing the jury as follows:

"If the law has been violated by the taking of an innocent human life in a wrongful way, or in a criminal way, vindicate and uphold the majesty, the dignity and supremacy of the law. If it has not been violated by the taking of an innocent human life, but, upon the other hand, it was the taking of a guilty life, or the life of a man that was seeking the life of the defendant, and that it was a condition from which the defendant could not escape except by doing as he did do, then you are to acquit him."

XV.

Because the court erred in instructing the jury as follows:

"Now, if the defendant was careless and negligent, and for that reason was misled by the facts; but these propositions are given upon the hypothesis and supposition that the defendant was in the right, and that this state of case that I have already enumerated actually existed, or there was something existed that would bring into existence and permit you to believe this second proposition, and that is, that at the time Jones was doing something which was really and actually not of a deadly nature or about to be of a deadly nature, but was conceived to

be so by the defendant making an honest mistake, because he had failed to exercise reasonable care to know the truth, and he was in the right, and Jones was doing something that misguided him, but not of a *deadly nature*, but the defendant conceived it to be of a deadly nature, and because of this mistake upon his part he took the life of Jones because of that, he is guilty of the crime of manslaughter because he did not do his duty. His duty was to make that observation under the circumstances that would have enabled him to know the true condition." (R. p. 36.)

XVI.

Because the court erred in refusing to give the following instruction asked by the defendant:

"The court further instructs the jury that the defendant is never required to prove that he is innocent, and in order for him to be acquitted it is not necessary that the jury should be satisfied in their minds that he is in fact innocent. He is not entitled to be acquitted upon a mere vague conjecture or supposition of innocence, but is whenever there arises out of the evidence a probability that he is innocent. A probability of innocence is always a reasonable doubt of guilt.

"This probability of innocence need not be as reasonable as the probability of guilt. In other words, although the theory that he is guilty is more reasonable than the theory that he is innocent, yet if there arises out of the evidence, and there is supported by the evidence, a reasonable theory under which the defendant is probably innocent, then he is entitled to be acquitted." (R. p. 44.)

XVII.

Because the court erred in refusing to give the following instruction:

"That whenever there arises in the consideration of the case any fact or circumstance capable of two reasonable constructions, one tending to establish guilt and the other innocence, then it is and will be your duty to give it that construction tending to show the innocence of the defendant instead of his guilt, and whenever there is in the mind of the jury a reasonable doubt arising out of the evidence as to any fact or circumstance in the case it will be your duty to solve that doubt in favor of the defendant." (R. p. 44.)

XVIII.

Because the court erred in refusing to give the following instruction:

"The court instructs the jury that if they believe from the evidence that the defendant was where he had the right to be, and that he was not the provoker of nor the aggressor in the difficulty in which the deceased lost his life, then the defendant was not required to retreat or flee from any danger, real or apparent, with which the evidence may show he was threatened by the deceased, but under the law he had the right to stand his ground and to meet force with force sufficient to overcome his adversary, even to the extent of killing him if the evidence shows it was necessary or would have been deemed necessary by a man of ordinary prudence and courage, to do this in order to save himself from the real or apparent danger of the loss of life or grievous bodily harm then and there about to be done him by his adversary." (R. p. 44.)

XIX.

Because the court refused to give the following instruction asked by defendant—No. 3:

"Uncommunicated threats, if proven, may be considered by the jury whenever the evidence is conflicting as to who was the aggressor in the difficulty, and whenever there is uncertainty as to this, as shedding light upon that question, and also in determining the frame of mind which the deceased had and entertained towards the defendant.

"Communicated threats, if proven, may be considered by the jury for the purpose of determining the question as to whether or not the acts and conduct of deceased at the time of the killing were such as would lead a man of ordinary courage and prudence, situated as was defendant, to believe that the deceased then and there designed to kill him or to do him some great bodily harm, and whether or not there was imminent and impending danger, real or apparent, of such design being then and there accomplished. In determining this question the jury should not give the defendant the benefit of needlessly exaggerated fears. He is not entitled to be acquitted upon the mere fear or apprehension of danger, however honestly and sincerely entertained, if there was no overt act upon the part of the deceased evincing a present design or intention then and there to kill him or to do him some great bodily harm; and if there was no imminent danger, real or apparent, of such design being then and there immediately accomplished. But they should not try him by the light of subsequently developed facts, nor require of him the same cool and correct judgment which they can now bring to bear upon the occurrence. They should put themselves as far as possible in the place of the defendant and judge of his acts and conduct at the time he struck the fatal blow as they would of the acts and conduct of a man of ordinary prudence and courage situated as was defendant. And if the jury have a reasonable doubt, arising out of the evidence, as to whether or not a reasonable man of ordinary prudence and courage, when situated as was defendant at the time he struck

the fatal blow, would have believed and would have had good reason to believe, from the conduct and actions of deceased, as disclosed by the evidence, at the time the defendant struck deceased, that he was then and there in immediate and imminent danger of the loss of life or grievous bodily harm, then and there about to be done him, and that defendant at the time the blow was struck did so believe, and that defendant so believing, in good faith, and for that reason and to protect himself from such danger at the hands of the deceased (if the evidence established such danger), struck the blow which killed the deceased, then the defendant would not be guilty." (R. p. 44 and 45.)

XX.

Because the court modified special instruction No. 3 by striking out the following part of the said instruction, to-wit:

"Uncommunicated threats, if proven, may be considered by the jury whenever the evidence is conflicting as to who was the aggressor in the difficulty, and whenever there is uncertainty as to this, as shedding light upon that question, and also in determing the frame of mind which the deceased had and entertained toward the defendant.

"And if the jury have a reasonable doubt arising out of the evidence, as to whether or not a reasonable man of ordinary prudence and courage, when situated as was defendant at the time he struck the fatal blow, would have believed and would have had good reason to believe from the conduct and action of the deceased, as disclosed by the evidence, at the time the defendant struck the deceased, that he was then and there in immediate and imminent danger of the loss of life or grievous bodily harm then and there about to be done him, and that defendant at the time the blow was struck did so believe, and that the defendant so believing, in good faith, for that reason and to

protect himself from that danger at the hands of the deceased, if the evidence establishes such danger, struck the blow which killed the deceased, then the defendant would not be guilty." (R. p. 45 and 46.)

XXI.

Because the court erred in refusing to give instruction No. 4, as asked by defendant, which instruction is as follows:

"If the jury believe from all the evidence that defendant had in his possession a cow, the property of Ed Jones, which he declined to give up unless the said Jones established his right to her possession by law; that the deceased in company with his brothers came to the defendant's place the morning of the day on which the difficulty occurred; that defendant refused to permit them to take the cow away, and told them in substance that they could not get her except by law, and ordered them to leave his premises and not return; that after this there was communicated to the defendant threats which the deceased had previously made against his life; that when the defendant returned home he saw the deceased and his brothers within his enclosure endeavoring to get the cow away without his consent: that he then went through his yard and orchard with a gun which he had with him when he arrived at home, to where deceased was, not for the purpose of having a difficulty with deceased or his brothers, but for the purpose of getting them to let the cow alone and go away from his premises; that deceased and his brothers were requested to go away and let the cow alone, and that instead of doing this, a quarrel ensued between them and the deceased, being a left-handed man, put his left hand on a pistol in his left trousers pocket and with his hand in that position went toward defendant in an angry and threatening manner when defendant was not attempting to harm him, and as he got near the defendant, made an overt act as if

he then and there intended and designed to shoot the defendant; and that the defendant then and there had good grounds to believe from said acts of deceased, and did believe from deceased's acts and conduct, that deceased intended to shoot him, and defendant, in good faith, to prevent this, knocked the deceased down with his gun, then he was, under the law, justifiable, and the jury should acquit him; and if there arises out of the evidence a reasonable doubt as to whether or not the blow which killed the deceased was struck under the facts and circumstances as herein set out, then he is entitled to be acquitted." (R. p. 46 and 47.)

XXIII.

Because the court erred in inserting in special instruction No. 4 the following words, to-wit:

"Provided there was no other reasonable means of protecting himself from death or great bodily harm."

And striking out from said instruction the following, to-wit:

"And if there arises out of the evidence a reasonable doubt as to whether or not the blow which killed the deceased was struck under the facts and circumstances as hereinabove set out then he is entitled to be acquitted." (R. p. 46 and 47.)

The record shows that all proper exceptions were saved at the proper time and in the proper manner, and the assignments of error point out each specifically, as shown by the bill of exceptions. (R. p. 37 to 47 and 48 to 59.)

ARGUMENT AND AUTHORITIES.

DUTY OF DEFENDANT TO RETREAT.

We submit that under the evidence in this case the court erred in its instruction to the jury as set out in specification of errors Nos. 1, 2, 3, 4, 5 and 14, upon the law of self-defense, and as to the duty of the defendant below to retreat before striking his adversary. The same inherent vice is found in each of the above stated specifications and it is unnecessary to repeat each of them at length.

That part of the court's instruction above referred to is to this effect upon the subject of self-defense: That if defendant below was:

"In the lawful pursuit of his business, (that means doing what he had a right to do at the time) is attacked by another under circumstances which denote an intention to take his life, or to do him some great bodily harm," that then he could only invoke the doctrine of self-defense, "provided he use all the means in his power otherwise to save his own life, or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him." (R. p. 18–19.)

Again:

"A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take his life, or to do him some enormous bodily harm, may lawfully kill his assailant, provided he use all the means in his power to save his own life, or prevent the intended harm, such as retreating as far as he can or disabling his adver-

say without killing him, if it be in his power." (R. p. 19 and 20.)

Again:

"There is but one place where he need not retreat any further—where he need not go away from danger—and that is in his dwelling house." (R. p. 23.)

Again:

"It requires, first, that the proof must show that William Jones was doing an act of violence, or about to do it, or apparently doing it or about to do it, but that it was an act that the defendant could have escaped from by doing something else other than by taking the life of Jones, by getting out of the way of that danger, as he was called upon to do." (R. p. 35.)

The above propositions are very frequently repeated in the court's instruction to the jury, without any qualification; without any attempt to inform the jury when defendant was not required to retreat; without telling them that he was not required to do so if the attack was so fierce and sudden as to make it apparently as dangerous to retreat as to stand; and the court concluded the elaborate charge to the jury with this erroneous statement of the law of self-defense:

"But upon the other hand, if it was the taking of a *guilty life* or the life of a man that *was seeking the life of the defendant* and that it was a condition from which the defendant *could not escape* except by doing as he did do, then you are to acquit him." (R. p. 37.)

In other words, this parting injunction of the court to the jury, and its summary of the law of self-defence was, that before

the jury should acquit the defendant it must appear that he took a *guilty life*, or the life of a man *seeking to take his life*, and that even then the defendant would not be justifiable unless it "was a condition from which the defendant *could not escape* except by doing as he did," wholly ignoring the law that defendant could lawfully kill if deceased was *either* seeking to take his life *or* to do him great or enormous bodily harm; and wholly omitting the qualification that retreat (escape was too strong a word) was not required if it was either actually or apparently as dangerous to do so as to stand, or that retreat was not required if the attack was so sudden or fierce as to render it apparently unsafe for the defendant to do so; and we submit, without the further modification, which should have been given, that he was not required to retreat if he was where he had the right to be, and was neither the aggressor in, nor provoker of the difficulty; and if he was attacked by deceased with a deadly weapon under circumstances which indicated to defendant, as a reasonable man, that deceased then and there intended to take his life or to do him grievous bodily harm.

The defendant was not required to retreat according to the facts established by his evidence, and it was the duty of the court in charging the jury to present the law applicable to his theory. The deceased when struck was in striking distance of defendant, advancing on him in a threatening manner, and when asked what he intended to do, replied, "Damn you, I will show you," and immediately attempted to draw his pistol when de-

fendant struck him, not for the purpose of killing him, which he could have done by shooting him, but in order that he might disarm him and thereby prevent being killed (R. p. 13–14). Under this state of facts he was not required to retreat, and the jury should have been instructed upon the whole case and upon every theory presented by the testimony.

"These attacks of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books, that one cannot justify the killing of another, though apparently in self-defense, unless he retreat to the wall or other interposing obstacle before resorting to this extreme right; but where an attack is made with murderous intent, there being sufficient overt act, the person attacked is under no duty to fly; he may stand his ground, and if need be, kill his adversary. *And it is the same where the attack is with a deadly weapon*, for in this case a person attacked may well assume that the other intends murder, whether he does in fact or not."

Bishop's New Crim. Law, sec. 850.

"He is not compelled to retreat or go to the wall from an *assailant armed with a deadly weapon*, and if he is driven to the wall so that he must be killed or sustain great bodily harm, and therefore kills his assailant, it is excusable homicide."

Rice on Crim. Ev., p. 573.

"A brief examination of American authorities makes it evident that the doctrine as to the duty of the person assailed to retreat as far as he can before he is justified in repelling force with force, has been greatly modified in this country, and has

with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strong against the enforcement of any rule which requires a person to flee when assailed to avoid chastisement, or even to save human life, and that tendency is well illustrated by the recent decision of our courts bearing on the general subject of the rights of self-defense *(Runyan vs. The State, 26 Am. Rep. 52)*. This principle has been carried to its fullest extent in several of our decisions, and has been vindicated in many others that are not reported."

Rice on Crim. Ev., sec. 574.

"In the words of a learned court, as quoted in a previous section, any felonious assault comes under the head of perfect defense, and this resistence may be to the death without any flying or avoiding of combat."

1st Bishop, sec. 867.

"Flight is a mode of escaping danger to which a party is not bound to resort so long as he is in a place where he has a right to be, and is neither engaged in an unlawful enterprise, nor the provoker of, nor the aggressor in the combat."

Bang vs. State, 60 Miss. 574.

Long vs. State, 52 Miss. 35.

"However the rule may have been at one time, it is certainly now well settled that a person is not compelled to flee from his adversary *who assails him with a deadly weapon* and go to the wall, as it is termed, before he can justify the homicide."

Tweedy vs. State, 5 Ia. 433.

"A man may repel force by force in defense of his person, habitation or property, against one or many who manifestly intend and endeavor to commit a known felony, by violence or surprise, on either. In such case he is not compelled to retreat, but may pursue his adversary until he finds himself out of danger, and if in the conflict between them he happen to kill him, such killing is justifiable."

Wharton on Crim. Law, vol. 2, sec. 1019.

In *Runyan vs. State, 57 Ind. 780*, the court below instructed the jury, among other things, as follows:

"Before a man can take life in self-defense he must have been closely pressed by his assailant, and must have retreated as far as he safely or actually could in good faith, with the honest intent to avoid the violence of the assailant."

The court, in its opinion reversing the case, said in regard to the above charge:

"That portion of the instruction last above quoted clearly does not state the law of self-defense correctly as it is now announced by the general drift of American authorities."

The case of *Erwin vs. State, 29 Ohio St. 186*, in commenting upon the law of self-defense, the court stated:

"The question then is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the sole ground that he failed to fly from his assailant when he might safely have done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life where the assault

is provoked; but a true man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm. Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him; still the jury could not have acquitted if they found he failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. In this case we think the law was not correctly stated."

Our position upon this point is also sustained by the following authorities:

State vs. Sherman, 16 R. I. 631.
State vs. Thompson, 9 Ia. 213.
Baltrip vs. State, 13 S. W. 1106.
State vs. Evans, 33 W. Va. 417.
People vs. Gonzales, 12 Pac. 783.
Stonehen vs. Commonwealth, 12 S. E. 238.
Bradford vs. Commonwealth, 5 S. W. 343.
May vs. State, 4 S. W. 491.
State vs. West, 12 South'n Rep. 10.

He was not required to retreat if upon his own premises.

Eversole vs. Commonwealth, 26 S. W. 816.
Baker vs. Commonwealth, 19 S. W. 976.
Tingle vs. Commonwealth, 11 S. W. 112.
1st Wharton, sec. 476 A.
Fields vs. State, 32 N. E. 780.
Gallagher vs. State, 3 Minn. 270.

If the evidence in this case justified the court in charging the jury that defendant was required to retreat, they should at the same time have been instructed when defendant was, and was *not* required to retreat. To tell them that notwithstanding defendant "was in the lawful pursuit of his business, and was attacked by deceased under such circumstances as to denote an intention to take life or do great bodily harm," that he was only justifiable, "provided he used all the means in his power to save his own life or prevent the intended harm, such as retreating as far as he can," (R. p. 19) stated the proposition too broad and was prejudicial to the defendant.

The Supreme Court in *State vs. West, 12 South'n Rep. 10,* condemned this statement in the following language:

"This statement is too broad; there are many cases where a person is not called on to employ all the means within his power, consistent with his safety, to avoid a danger and avert its necessity, and there are many cases where a person must not necessarily retreat, where retreat is practicable."

The court should have stated the law of self-defense in a clear, concise way, without unnecessary repetition, and in such a manner as to make the charge applicable to all theories of the case, clearly defining under what circumstances defendant was and was not required to retreat. We can make no better argument to sustain our contention than to quote the following from the opinion of the Supreme Court of Wisconsin:

"The court erred in not stating the conditions under which retreat is necessary. The defendant did not retreat before kill-

ing the deceased. Therefore he was not justifiable. This is the import of the instruction: 'If any forcible attempt is made with a felonious intent against a person or property, the person resisting is not obliged to retreat, but may pursue his adversary until he finds himself out of danger.' *(Pond vs. People, 8 Mich. 150.)* 'Where an attack is made with murderous intent, the person attacked is under no obligations to fly. He may stand his ground, and if need be, kill his adversary.' *(1st Bishop Crim. Law, sec. 850.)* 'The obligation to retreat does not arise at all in ordinary cases, but the assailed may stand his ground and repel force by force. *(Horr. & T. Self-Def. p. 230.)* The conditions under which retreat is necessary were not given by the court, but the instruction is, that no matter what facts the jury find as to the assault of the deceased upon the defendant, it was his duty to retreat. It was, in effect, finding the defendant guilty or the killing not justifiable. The learned Attorney-General admits the conditions upon which retreat is necessary, as above stated, and therefore I need cite no more authorities upon that question, but refer to those cited in the brief of the learned counsel of the plaintiff in error. But it is contended that the circumstances were such that it was the duty of the defendant to retreat rather than kill the deceased. It was the province of the jury to find the circumstances under which the defendant ought to have retreated, rather than the attorney-general, and they were not required or allowed to do so. If it was proper to instruct the jury on the subject, the court should have told them under what state of facts or circumstances it was encumbent on the defendant to have retreated. The error is obvious and quite material."

Perkins vs. State, 47 North W. Rep. p. 827.

See also *Ervin vs. State, 29 O. St. Rep. 186.*

State vs. Kennedy, 7 Nev. 374.

Gonzales vs. State, 12 S. W. 733.
Wharton on Hom., secs. 487–488;
And others heretofore cited.

It was error to instruct the jury:

"If it be true that Wm. Jones, at the time he was killed, was exercising *deadly violence* or about to do so, or apparently exercising it, or apparently about to do so, and the defendant could have *paralyzed the effect of that violence* without taking the life of Jones, but did not do it, but resorted to this deadly violence when he could have protected his own life without resorting to that dernier remedy * * * he is guilty of manslaughter." (R. p. 36.)

If correct as an abstract proposition, there was no evidence to sustain this charge. The uncontradicted evidence shows that defendant could have used more violence, could have shot deceased; he struck deceased because he did not wish to resort to that "dernier remedy," believing he could protect himself by knocking deceased down and disarming him (R. p. 14). For the court to tell the jury that if "the defendant could have paralyzed the effect of that violence without taking the life of Jones, but did not do it," then he was guilty of manslaughter, was virtually an intimation to them that he resorted to more violence than he should, and that he could in some way "have paralyzed the effect of that violence." The jury may have been satisfied from the evidence that defendant was justifiable in striking deceased, but probably concluded from this instruction that he should have given him such a scientific blow as to have "*para-*

lyzed the effect of that violence," or should have so accurately measured the strength of the blow as to have "*paralyzed the effect of that violence.*"

We submit the instruction was misleading and improper.

UNCOMMUNICATED THREATS.

The court's instruction upon this question is fatally erroneous in two respects. (1) It, in effect, told the jury to first determine the attitude of the parties from the other evidence in the case; (2) and then not to consider the uncommunicated threats unless "it was a *serious question* in their mind as to the position of the parties." This instruction denied to the defendant the advantage of having the previous uncommunicated threats considered by the jury as a part of the whole case submitted to its decision. The jury was instructed not to consider this evidence if without it a clear conclusion could be reached as to who began the difficulty. Upon all the competent evidence introduced by the state, and a part of that for the defense, a material, vital inquiry was to be solved. If the conclusion so reached should be against the accused, he was to be denied all benefit of the excluded facts. So, also, if it should be in his favor, for it was to be considered by the jury *only* if upon the other evidence it should be a *serious question* as to the attitude of the parties. A similar instruction is condemned in *Johnson vs. State, 66 Miss. 191*.

The true rule is, that if the evidence is conflicting, or if

there is any uncertainty *(not a serious question)* as to the attitude of the parties, then uncommunicated threats are to be considered by the jury to show: (1) The *quo animo* of the deceased; (2) to show who began the difficulty; (3) to show the attitude of the deceased; (4) to corroborate communicated threats.

Rice on Ev. pp. 579–580.
Cornelius vs. Commonwealth, 15 B. Monroe 539.
Approved in *Haller vs. State, 37 Ind. 57.*
Roberts vs. State, 68 Ala. 156.
Wharton on Hom. 695.
Wharton on Ev. sec. 757.
State vs. Turpin, 77 N. C. 473.
See also *note 61 Am. Dec. p. 53*, for full discussion of this question.

"If there is the slightest evidence tending to prove a hostile demonstration which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm, the threats should not be excluded."

Garner vs. State, 29 Am. St. Rep. 240; (28 Fla. 113).

In this case the jury were instructed not to consider the uncommunicated threats at all, unless it was a *serious question* as to the attitude of the parties; and then they were to be con-

sidered *only* to "illustrate the position of the parties," (R. p, 27) to see "what was the attitude of the parties." (R. p. 27.)

COMMUNICATED THREATS.

The court erred in charging the jury that before they should consider the communicated threats at all, "the deceased must have been doing some act of an overt character, which, when considered in the light of previous threats, would indicate to the mind of the defendant, as a reasonable person, situated as he was, that *deceased meant to take his life*." (R. p. 27.) This error is not cured by giving part of the special charge asked by defendant upon communicated threats, for the court had just previously instructed the jury:

"If the evidence in the case shows, at the time of the killing, that the deceased was making, really or apparently, *a violent demonstration*, then you may take into account, as the defendant had the right to take into account at the time, the communicated threats." (R. p. 27.)

And immediately after giving that portion of the instruction, told the jury:

"If this deceased young man was not, at the time of the killing, actually or apparently making a demonstration that would indicate a *deadly purpose*, then the communicated threats pass out of the case, because they cannot be considered." (R. p. 29.)

It will, therefore, be seen that the jury was instructed not to consider communicated threats unless, (1) the deceased was

doing some overt act which indicated that he *meant to take his (defendant's) life* (R. p. 27); (2) unless the deceased was making, really or apparently, *a violent demonstration*, (R. p. 27); or (3) was making demonstrations which indicated a *deadly purpose*. (R. p. 29.)

If the jury believed from the evidence that deceased meant to do defendant great or enormous bodily harm, the threats, under this instruction, could not be considered, nor could they be considered unless the demonstration was *violent*. A jury, taking the words "violent demonstration" in their ordinary meaning, might not consider the act of deceased, when he attempted with his left hand to draw a pistol, *a violent demonstration*; yet, it certainly was such an overt act as made communicated threats an important factor in the case.

PROVOKING THE DIFFICULTY.

We do not think there is any evidence to support the instruction of the court set out in specification of error No. 12. (R. p. 41.) The defendant was on his own premises and the undisputed evidence is, that when attacked by deceased he had done nothing except to ask deceased and his brothers to leave his premises and let the cow alone. (R. p. 8–12–13.) The instruction upon this point, as set out, is misleading and not applicable to the facts.

Robinson vs. Commonwealth, 11 S. W. 82.
Hamlin vs. Commonwealth, 12 S. W. Rep. 146.
White vs. State, 3 S. W. Rep. 713.

The language of the court, if any instruction should have been given upon that point, is not clear. What fault or measure of provocation which would deprive the defendant of the right of self-defense, is not sufficiently explained. The right to defend himself is not forfeited in every case where a defendant is to some extent at fault, or even the provoker of the difficulty.

White vs. State, 3 S. W. 713.
Allen v. Commonwealth, 86 Ky. 642.
State vs. Gilmore, 95 Mo. 554.
State vs. Bryant, 102 Mo. 24.

We call especial attention of the court to the case of *Thompson's United States*, decided by this court December 3, 1894, where an instruction of similar import is held to be erroneous.

Among the other propositions in this assignment of error is the following:

"Again, going to the place where the slain person is, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray. Now, if a man does this he is in the wrong and he is cut off from the right of self-defense, *no matter what his adversary may do.*"

According to this, if the defendant was on his own premises, armed with a gun (which we submit he had the right to carry), went to where the deceased was with the *mere intent to have an affray*, he could not thereafter invoke the law of self-

defense, *no matter what deceased did*. His mental condition, "*intent to have an affray*," though not manifested by any hostile word or act, cut off the right of self-defense. If, having *only* the intent to have an affray, he went to where deceased was with his gun, but after reaching there did absolutely nothing, either by word or act, toward provoking or bringing about the difficulty, he forfeited the right of self-defense, and he could not defend himself, though the deceased, without any provocation, was attempting to kill him.

"Now, again, if the defendant knew there was a *deadly feeling* existing between himself and this young man, and he could have avoided *that* by the exercise of due care, it was his duty to do so."

We submit, with due reference to the learned court below, for whom we have the greatest respect, that this proposition extends the forfeiture of the right of self-defense beyond the limit authorized by law. Analyzed, it means: The defendant knew there was a deadly feeling existing between them (deceased and himself); it was his duty to avoid that feeling by the exercise of due care. He did not avoid that feeling, therefore, he forfeited the right of self-defense. Conceding that defendant might, and that it was his duty to have avoided his own "*deadly feeling*," if he had any, by the exercise of due care, he was required to go beyond that, and as a condition precedent to defending himself, was required to avoid the deadly feeling" existing between himself and this young man;" for the court says

he must avoid "*that*," if he can, by the exercise of due care. If he did not do so, then a condition existed under which he could not invoke the law of self-defense. (R. p. 30 and 41.)

ACTUAL DANGER.

The assignment of error No. 8 is well taken. The court used the following language:

"Unless the party had reasonable ground of apprehension at the time, the bare justification will fail, it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, *if there be no actual danger at the time*."

The error consists in the use of the words "if there be no actual danger at the time." It is true that the court elsewhere in its instruction stated to the jury that the danger need not be real, but only apparent. But when it is considered that the court called the special attention of the jury to the fact that he was then reading from an opinion of a justice of the Supreme Court of the United States, and when immediately after the use of the words "if there be no actual danger at the time," he used the following words: "*How just, how humane, and how proper that protection is*," it cannot be said with confidence that the jury was not misled by the use of the above language.

CHARACTER OF DECEASED.

The court should not have told the jury that "of course there is no contention here as to the lawless and desperate

character of the deceased," (R. p. 52) but should have left that fact, whether or not he was of lawless or desperate character, to the jury. The evidence shows that he was going about armed with a deadly weapon, making repeated threats against the life of the defendant. This was sufficient to raise a question as to whether or not he was either lawless or desperate.

DUTY OF DEFENDANT.

We insist that the fifteenth specification of error (R. p. 36) is so confused as that it tended to embarrass and bewilder, rather than to aid the jury. Again it is abstract in this, that there is absolutely no proof to show that defendant was by his carelessness or negligence, mistaken or misled by the acts of the deceased as to his purposes or intentions, or that deceased was doing anything other than attacking the defendant. Moreover, it was not the duty of the defendant "*to make that observation under the circumstances that would enable him to know the true condition*" as to what the deceased intended or was doing. All that the law enjoined upon the defendant was, that he believed in good faith, at the time he struck the blow, that the deceased was about to take his life or do him some great bodily harm, and that it was necessary in order to avert that result to strike the deceased.

We think the fair tendency or effect of this instruction was to suggest to the jury, without any evidence whatever to support it, that the deceased when struck was doing something

other than attacking the defendant, which misled him, and if defendant had not been careless or negligent he would not have been misled; but being careless he was misled and mistaken, though honestly, and had killed the deceased when deceased was not attacking him, and therefore defendant was guilty of manslaughter.

REFUSED INSTRUCTIONS.

The refused instructions, as shown by assignment of errors Nos. 17, 18, 19, 20 and 22, should have been given. We think they correctly embody the law of self-defense applicable to the theory of the defendant, and that they were supported by the testimony in his behalf. Instruction No. 4, assignment of error No. 22, we especially insist should have been given. It was a clear, succinct statement of defendant's theory and set out a state of facts which, if true, made the homicide justifiable. The court should have given the instruction as asked and it was error to strike out the clause to the effect, that if a reasonable doubt arose out of the evidence as to whether or not the killing was, under the facts and circumstances as set out in the instruction, he should be acquitted, and the court ought not to have inserted, in lieu thereof, the words "provided there was no other reasonable means of protecting himself from death, or great bodily harm."

For the errors assigned, the judgment should be reversed, and the defendant granted a new trial.

JOHN H. ROGERS,
IRA. D. OGLESBY,
Attorneys for Plaintiff in Error.

158-570

Office Supreme Court U. S.
FILED.
MAR 7 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

BABE BEARD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 842.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

BABE BEARD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 842.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

Plaintiff in error, Beard, was charged with the murder of Will Jones, his wife's nephew, who was about 20 years of age, and was convicted of manslaughter and sentenced to eight years' imprisonment.

He was 35 years of age and weighed 155 pounds. The killing was on December 16, 1893. Deceased and two brothers, John, 19 years of age, and Ed, about 9 years of age, were orphans. Their father died many years, and their mother about three years, before the killing. (Tr., p. 7.)

The three children were placed with relatives after the death of their mother. Ed lived with Beard until November, 1893, when he left. When Ed was placed with Beard a cow, all his patrimony, went with him.

On the morning of the day of the killing, which occurred in the afternoon, deceased and his two brothers went to Beard's home to get this cow, one of them taking a shotgun. Beard, who was on his porch and had a gun in his hand, refused to let them take the cow and made them leave his premises. (Tr., p. 7.)

One Winters testified that on the day before the killing deceased was at the place of witness and said he had started to Babe Beard's after his cow, and that he would have one of the cows or kill Beard, and that he (Winters) told one Byers to communicate this to Beard, and that he (Winters) on the day of the killing, and before the killing, told Beard of the threats deceased had made. (Tr., p. 11.)

Byers testified that he told Beard, before the difficulty and on the evening of the killing, that Winters had stated that he heard deceased say that he was going to have the cow at Beard's or kill Beard. (Tr., p. 12.)

Beard testified that the threat, as communicated to him by both Winters and Byers, was that deceased said he would either get the cow or kill him. (Tr., p. 13.)

That afternoon the three Jones boys returned to Beard's home and undertook to drive away a calf, the offspring of the cow, and Beard's wife was endeavoring to drive it back. At this juncture Beard returned home with a gun. His orchard was a part of his house-yard inclosure. He

went to the orchard fence, a distance of 50 or 60 steps, near to where deceased was on the opposite side of the fence. (Tr., p. 13.)

Up to this point there is no material conflict in the evidence.

Beard testified:

> Seeing Mrs. Pounds a short distance off I called to her and asked her to come there and hear what I had to say to them. She came, and I told them to leave my premises. They did not do so, but Will Jones, who was at the time 10 or 15 yards away from the fence, turned and started toward me in an angry manner and in a brisk walk, with his left hand in his left trousers pocket. When he got within five or six steps I told him to stop, but he did not do so. As he approached nearer I asked him "What are you going to do?" To which he replied, "Damn you, I will show you," at the same time making a movement with his left hand as if to draw a pistol from his pocket. Believing from his demonstrations just mentioned that he intended to shoot me, I struck him over the head with my gun to prevent him killing me. As soon as I struck him his brother John, who was a few steps behind him, started toward me with his hands in his pocket. Believing that he intended to take part in the difficulty, and was also armed, I struck him, and he stopped. I then at once *jumped over the fence*, caught Will Jones by the lapel of the coat, turned him rather to one side and pulled his left hand out of his pocket. He had a pistol, which I found in his pocket, grasped in his left hand, and I pulled his pistol and his left hand out together. (Tr., pp. 13, 14.)

He stated that his gun was loaded, and that after the blow he fired it in the air, to show that it was loaded to John Jones, who questioned it. (Tr., p. 14.)

He says:

> I had the breech in my right hand and my left hand forward upon the barrel, with the muzzle up a little above my head, and struck at him in that way. (Tr., p. 14.)

He could not possibly have delivered the blow as described with a greater distance than 5 feet intervening between him and deceased, and probably a less distance would be the maximum, with a fence between them.

Therefore, deceased must have advanced, after Beard says he started toward him in an angry manner, at least from 10 to 13 feet without ever drawing a weapon.

It is hardly credible that a man would make an attack with a pistol upon another armed with a rifle, held in a position to shoot, by making one forward movement, and advance close enough to be knocked in the head with the rifle, without ever drawing his weapon.

It is less credible that one armed with a loaded gun would, without bringing his gun forward into a position to shoot, permit another who had threatened his life and whom he had reasonable grounds to believe was going then to shoot him with a pistol, to advance so close to him that he could use the gun as a bludgeon. The distance which deceased advanced without drawing his pistol, after making the alleged movement to draw, demonstrated that he did not purpose to follow up any supposed intent to draw any weapon. But the defendant's story is shown to be utterly false by every other witness of the killing.

John Jones testified that the deceased went to the fence "at which defendant was standing and stopped, putting his left foot in the crack of the fence and one of his hands—the left, I think—on the fence, and was talking to the defendant. About this time defendant's wife, who was at some distance off, slapped Ed Jones, and the deceased turned his head in that direction, when defendant struck him with a gun which he had in his hand, and deceased fell. * * *

While deceased was standing at the fence he had his left hand on the fence and was picking his teeth with left hand, but don't know where his hands were at the time he was struck, but think they were in that position."

"Deceased was doing nothing and was not saying anything to defendant when he struck. Deceased had been at fence for some little time." (Tr., pp. 7 and 8.)

Ed Jones testified:

> Deceased walked to the fence where defendant was and stopped a little while. While there defendant's wife slapped me. When deceased turned his head to look in that direction defendant struck him with the gun. * * *
>
> After deceased got to the fence he stood there awhile with one of his feet on the fence and he was picking his teeth with a splinter. (Tr., p. 9.)

Mrs. Pounds, a disinterested witness and of no kin to the parties so far as shown, and the person whom defendant had called to witness his proceeding in dealing with the Jones boys, shows that deceased had been at the fence some minutes before the blow; that Mrs. Beard slapped Ed, and deceased turned to look in that direction, and that then defendant struck him; that deceased while at the

fence was picking his teeth with one of his hands. (Tr., pp. 8 and 9.)

These were all of the witnesses of the killing.

It is entirely certain that defendant's statement is a fabrication, and that he struck the murderous blow, not only when he was not in any real or apparent danger of being attacked, but when his victim's head was turned from him and his mind was intent on another transaction. Every witness except Beard, three in all, testifies clearly and positively to this state of facts. None of them are impeached, nor are they contradicted, except by Beard, and one of them is entirely disinterested. His conduct, in going to the fence, calling up a witness, in striking when deceased had been near him for some time and engaged in picking his teeth, and when he was unguarded and looking in another direction, and his forecast for a defense in searching the pocket of the helpless youth for a pistol, and finally in firing off his gun to show that he could have shot, reveal the cold-blooded deliberation and composure of a hardened criminal. If the jury had given him credence they would have been bound to acquit him under the charge, for he told a tale of self-defense, and could not, as he states the facts, have safely retreated.

He richly merited conviction for the higher crime, but doubtless the jury took into consideration the trespass of the boys and the fact that defendant was on his own premises in mitigation.

No actual wrong has been done to defendant at the trial. No honest jury could fail to convict on the evidence. The wrong, if any, was in not convicting him of murder.

ASSIGNMENTS OF ERROR.

(For convenience the order pursued in the brief for plaintiff in error will be followed.)

Nos. 1, 2, 3, 4, 5, and 14 corresponding to the specifications set out in brief for plaintiff in error, pages 6 to 8 and 16, and treated under the head of "Duty of defendant to retreat," on pages 23 to 33.

The language objected to in the brief is set out as follows:

> In the lawful pursuit of his business—that means he was doing what he had a right to do at the time—is attacked by another under circumstances which denote an intention to take his life or to do him some great bodily harm, that then he could only invoke the doctrine of self-defense, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him. (R., pp. 18 and 19.)

Again:

> A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take his life or to do him some enormous bodily harm, may lawfully kill his assailant, provided he use all the means in his power to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. (R., pp. 19 and 20.)

Again:

> There is but one place where he need not retreat any further—where he need not go away from danger—and that is in his dwelling house. (R., p. 23.)

Again:

> It requires, first, that the proof must show that William Jones was doing an act of violence, or about to do it, or apparently doing it or about to do it, but that it was an act that the defendant could have escaped from by doing something else other than by taking the life of Jones, by getting out of the way of that danger, as he was called upon to do. (R., p. 35.)

This last is an extract from Exception XIII (plaintiff's brief, pp. 14 and 15), covering two pages of the charge. (Tr., pp. 35, 42.)

It cuts a sentence in two, and puts a period in the place of a comma. It disconnects the language from other language immediately preceding and following it, which qualify it. The assignment embraces three distinct propositions:

> First. The duty of retreating so far as consists with safety from real or apparent danger.
>
> Second. The responsibility of defendant for using care in observing the situation before killing.
>
> Third. His duty other than retreating, viz, to paralyze, if he could safely, his assailant's efforts without killing him.

No judge could tell without a specific objection that the part of the sentence above set out was intended to be excepted to.

The first proposition stated by the judge in the portion of the charge covered by the assignment is unquestionably sound, and the judge can not be put in error on a broad exception covering several distinct statements of the law of them be sound. (*Johnston* v. *Jones*, 1 Black, *Lincoln* v. *Claflin*, 7 Wal., 132; *Cooper* v. *Schlesinger*,

111 U. S., 148; *M. & G. R. Co.* v. *Jurly*, 111 U. S., 585; *Beaver* v. *Taylor*, 93 U. S., 46; *Harvey* v. *Taylor*, 2 Wal., 328; *W. and G. R. R. Co.* v. *Varnell*, 98 U. S., 479; *First Unitarian Society* v. *Faulkner*, 91 U. S., 423; *Conn. Mut. L. I. Co.* v. *Union Trust Co.*, 112 U. S., 250; *Burton* v. *West Jersey Ferry Co.*, 114 U. S., 474; *Allis* v. *United States*, 155 U. S., 122.)

In *Hicks* v. *United States* (150 U. S., 453) the rule was recognized, but it was considered by the court that the assignment was sufficiently definite. So, also, in *Hickory* v. *United States* (151 U. S., 316). Both of these were capital cases, and the whole record indicated that the convictions were not warranted.

The brief after the last extract (p. 24) adds: "The above propositions are very frequently repeated in the court's instruction to the jury, *without any qualification.*"

This statement is somewhat remarkable in view of the fact that the last extract was cut short and the phrase occurring in the same sentence "he must have *reasonably* sought to avoid that danger before he took the life of Jones" was omitted. (Tr., p. 35.)

In the sentence next preceding, but one, the above extract the judge said:

> And yet that the defendant at the time could have avoided the necessity of taking his life by the exercise of any other reasonable means, etc. (R., p. 35.)

It will be abundantly shown that the judge did sufficiently guard his statement of the law imposing a duty of retreating. Again the brief proceeds (p. 24):

> But, upon the other hand, if it was the taking of a guilty life, or the life of a man that was seeking

> the life of the defendant, and that it was a condition from which the defendant could not escape except by doing as he did do, then you are to acquit him. (R., p. 37.)

Again (brief, p. 32):

> If it be true that William Jones, at the time he was killed, was exercising deadly violence, or about to do so, or apparently exercising it, or apparently about to do so, and the defendant could have paralyzed the effect of that violence without taking the life of Jones, but did not do it, but resorted to this deadly violence when he could have protected his own life without resorting to that dernier remedy * * * he is guilty of manslaughter. (R., p. 36.)

This is an extract from assignment 13 above referred to and should not be considered, because the exception was not specific and for the reasons urged in respect of the extract on page 24 of brief from the same assignment.

The contention of plaintiff in error, based on the foregoing extracts from the charge, is that the judge charged unconditionally that Beard could not set up self-defense unless he had done all in his power to escape without killing and unless he retreated if in his power. It is further contended that one who is on his own premises is under no obligation at all to retreat and that he may under all circumstances stand his ground and repel force by force, and stand and kill, even though he might with safety have retreated and so have avoided the necessity for killing.

The extracts do not fairly show what the judge charged on self-defense.

They are taken out of their context. The portions excepted to contain only a general statement of the doctrine. In other parts of the charge in immediate connection he properly instructed in respect of what must be taken into consideration under the terms "means in his power" and "retreating as far as he can" and "disabling his adversary, if it be in his power."

On page 21 he says: "The danger to life or of great personal injury must be imminent, present at the time of the killing, real or apparent, and so urgent that there is no *reasonable mode of escape* except to take life."

Again: "Thereby inducing a reasonable belief upon the part of the slayer that *it is necessary* to deprive him of life to save his own." (Tr., p. 21.)

Again: "and the defendant could have avoided it by some other *reasonable means* at hand than by taking the life of the man he did kill, it was his duty to do so." (Tr., p. 21.)

Again: "the duty of avoiding the danger, if he can, *with a due regard to his own safety* by getting away from there or by resorting to some other means of less violence than those resorted to." (Tr., p. 24.)

Again: "It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can *with safety to himself.*" (Tr., p. 24.)

Again: "and yet that the defendant at the time could have avoided the necessity of taking his life by *the exercise of any other reasonable means*, and he did not do that because he did not exercise other reasonable means that *would have with equal certainty saved his life*," (Tr., p. 35.)

Again: "he must *have reasonably sought* to avoid that danger before he took the life of Jones." (Tr., p. 35.)

Again: "This great law of self-defense commands him at all times to do that which he can do under the circumstances, to wit, exercise *reasonable care to avoid the danger* by getting out of the way of it or by exercising less violence than that which will produce death and *yet will be equally effective to secure his own life*." (Tr., p. 36.)

It can not with any reason be urged that the judge charged that a man must retreat to the wall, or that he must retreat at all events and under all circumstances, or that he is not justified in standing his ground and meeting force with force, if due regard for his own safety demand it.

The entire charge is luminous with the principle that he must retreat if in his power, *provided he have a reasonable regard for his own safety;* that he must retreat, if thereby he can *without endangering his safety* avoid killing his adversary.

The jury could not fail to understand from the whole charge and from the reiterated instructions, that the cardinal and controlling principle is a reasonable regard for one's own safety under all the circumstances. They could not have understood that one who stands his ground and does not retreat thereby cuts himself off from invoking the principle of self-defense.

The whole charge and not detached portions must be looked to. (*State* v. *Cagle*, 2 Hum., 416; *Barnards* v. *State*, 88 Tenn., 231; *Gibson* v. *State*, 89 Ala., 121; *Magniac* v. *Thompson*, 7 Pet., 348; *Congress and Empire Spring Company* v. *Edgar*, 99 U. S., 645.)

RETREAT.

The contention of plaintiff in error is that the doctrine of retreat is abolished, and that one who is not at the time himself doing an unlawful act, or unlawfully present, need never give way before one armed with a deadly weapon, but may under all circumstances stand his ground, and kill if necessary in self-defense, even though he might by retreat avoid such necessity.

This is the doctrine stated by Bishop (sec. 850) in the passage quoted on page 26 of brief for plaintiff in error. An examination of the authorities cited to support the text shows a meager array. Horrigan & Thompson, in cases of self-defense, page 31, in note to the Selfridge Case, disapprove the doctrine on this point as laid down by Mr. Justice Parker and approve the view of Mr. Bishop.

The passage quoted (brief, p. 26) from Rice on Crim. Ev., page 573, does not state the principle as contended for by plaintiff in error. It says:

> He is not *compelled* to retreat or go to the wall from an assailant armed with a deadly weapon.

This is unconditional and without exception. Nothing like the converse of this was charged in this case. Being compelled to retreat at all events is very different from the duty to retreat if one can with due regard to his own safety, and this is what was charged.

The next passage quoted (brief, page 27) from page 574 of Rice, states merely that the doctrine of retreat has been modified to the extent that a person is not obliged to *flee* when assailed.

The only case cited in support of the text is *Runyon* v. *State* (57 Indiana, 80).

He states that the correct rule in self-defense is:

> If he has other means or ways of avoiding the assault that appear to him at the time sufficient and available, and that are in fact sufficient and available, he must resort to them and can not justify the force for his defense, etc. (Sec. 358.)

The case of Tweedy, cited by plaintiff, page 27, does not sustain his contention. It does say that one is not compelled to *flee* from an assault with a deadly weapon. Non constat that he may not be compelled to retreat if he can with equal safety. *The case distinctly recognizes* the *duty of such retreat.*

In the more recent Iowa case of *State* v. *Donnelly* (69 Iowa, 707) the supreme court of that State distinctly declares the obligation to retreat.

The case of *State* v. *Sherman* (16 R. I., 631), cited by plaintiff on page 29, does not sustain his contention, and the question was not directly involved in *State* v. *Thompson* (9 Iowa, 188), cited on same page, and what was said on this question was dictum. *Runyan* v. *State* (57 Ind., 80) and *Erwin* v. *State* (29 Ohio State, 186) sustain the doctrine contended for by plaintiff in error.

CONTRA.

That this doctrine is not obsolete in America is shown by the following authorities, which distinctly uphold it: *Gibson* v. *State*, 89 Ala., 121; *Lee* v. *State*, 92 Ala., 15; *Duncan* v. *State*, 49 Ark., 547; *People* v. *James*, 57 Cal., 119; *Darby* v. *State*, 79 Ga., 67; *Stiles* v. *State*, 57 Ga., 188; *Davison* v. *People*, 90 Ill., 231; *State* v. *Donnelly*, 69 Iowa, 707; *State* v. *Shippy*, 10 Minn., 223; *State* v.

Larrenson, 32 Minn., 121; *Commonwealth* v. *Selfridge*; *Parrish* v. *State*, 14 Neb., 67; *Commonwealth* v. *Drum*, 58 Penn. State, 20; *Sullivan* v. *State* (Ala.), 15 So., 264; *Clark* v. *Commonwealth* (Va.), 18 S. E., 440; *Holmes* v. *State* (Ala.), 14 So., 864; *State* v. *Trammell* (S. C.), 18 S. E., 940; *State* v. *Jones* (Iowa), 56 N. W., 427; *Johnson* v. *Commonwealth* (Ky.) 23 S. W., 507; *State* v. *Tarter*, 37 P., 53; *Commonwealth* v. *Bregesse*, 160 Pa. St., 456; *Webb* v. *State* (Ala.), 14 So., 865.

In a recent case the supreme court of Missouri said that the right of self-defense is not to be invoked unless all other means fail. It is the dernier ressort, and, in order to justify a homicide on the ground of self-defense, the doer of the homicidal act must have done everything in his power consistent with his safety to avoid the danger and to avert the necessity, and he must retreat if retreat be practicable. (*State* v. *Dettmer*, 27 S. W., 1119.)

This court, in *Starr* v. *United States* (153 U. S., 621), quotes with seeming approval from the Selfridge Case, which lays down the rule that one must retreat if he can with due regard to his own safety. It is claimed (brief, page 29) that the charge upon retreat, if otherwise correct, was erroneous because not applicable to one who, like Beard, was upon his own premises.

Of course the cases which hold, as in the Erwin and Runyan cases, make no distinction in this respect, for the right to stand and resist is not made dependent upon the locality.

The cases holding the contrary doctrine make an exception in favor of one who is in his own house, but the

exception is limited to the dwelling and buildings adjacent to or connected with the dwelling house proper. (Kerr on Homicide, sec. 184.)

This exception is made because the dwelling is regarded as sacred for the protection of one's person and family. (Bishop on Criminal Law, sec. 858; *Pond* v. *The People*, 8 Mich., 150; *Lee* v. *State*, 92 Ala., 15; *State* v. *Benham*, 23 Iowa, 154.)

It is objected on page 30 that the court, if correct in charging that one must retreat if he can, before killing, erred in not instructing when defendant was and was not required to retreat. This is followed by a version of the charge, as follows: "To tell them that notwithstanding defendant 'was in the lawful pursuit of his business and was attacked by deceased under such circumstances as to denote an intention to take life or do great bodily harm,' that he was only justifiable 'provided he used all the means in his power to save his own life or prevent the intended harm, such as retreating as far as he can,' stated the proposition too broad, and was prejudicial to the defendant."

If this were the charge, or the effect of all of it on this question, there would be an end of argument.

The above quotations purport to be taken from page 19 of the record. The last is a part of a sentence which continues "or disabling his adversary without killing him if it be in his power."

As has been shown, the judge fully explained the terms "all the means in his power" and "retreating as far as he can" as meaning that he must retreat, etc., if he could,

"with a due regard to his own safety," and in the exercise of a "reasonable care to avoid the danger by getting out of the way of it, or by exercising less violence than that which will produce death and yet *will be equally effective to secure his own life.*"

It is insisted that under the whole charge a liberal rule for the defendant was laid down, and that the jury could not fail to understand that he was bound to retreat only if under all the circumstances as they then appeared to a reasonable man he could reasonably and safely do so, having a due regard for his own safety.

The extract on page 32, as has been already shown, can not be considered because not properly excepted to.

UNCOMMUNICATED THREATS.

(Brief of plaintiff in error, page 33.) The brief of plaintiff in error assails the charge, saying:

> It in effect told the jury to first determine the attitude of the parties from the other evidence in the case, and then not to consider the uncommunicated threats unless "it was a serious question in their minds as to the position of the parties." (P. 33.)

Again:

> In this case the jury were instructed not to consider the uncommunicated threats at all unless it was a serious question as to the attitude of the parties, and then they were to be considered only to "illustrate the position of the parties," to see "what was the attitude of the parties." (Pp. 34 and 35.)

The evidence of uncommunicated threats all went to the jury.

The objection is that its consideration was limited to a case where there was "a serious question as to the position of the parties." If that fairly represented the instruction it would not be error, for the question must be serious enough to raise a doubt on a material matter and not be merely trivial. If it raise such a doubt it would certainly be serious. The court does not say "a serious doubt must be raised," but that the state of the evidence must be so conflicting or inadequate as to raise a serious question as to the position of the parties—that is, a question as to the position which is of importance in its bearing, and not a question as to position which is immaterial, for in the matter of self-defense some motions or attitudes are serious and others are wholly unimportant.

But the passage objected to is taken out of its connection. The offending word is "serious."

The context is as follows:

> Now, again, if the threat is uncommunicated and it is a serious question in your minds as to what was the position of the parties, then you may consider uncommunicated threats to illustrate the position of the parties to enable you to conclude what that position was. *If that is not a question*, if the evidence you find to be true in the case discloses the condition and position of the parties, then the uncommunicated threats pass out of the case. (Tr., p. 27, Specification XI, plaintiff's brief, p. 12.)

Here the court makes "serious question" and "question" equivalent, and shows when the state of proof excludes such question. If there were any doubt as to the impression the jury might receive from the particular phrase selected for criticism, there could not from the

whole charge upon this subject be any question as to the meaning of the court. He said, on page 25, that uncommunicated threats were "relevant to show that at the time of the meeting the deceased was seeking to take his life."

He further said, on page 28, as follows:

> Where evidence has been given making it a question for the jury whether the killing was excusable self-defense, evidence of threats made by the deceased against the defendant a short time before the killing, but not communicated to the defendant before the killing, is admissible. This is upon the proposition I have already given you with regard to uncommunicated threats.

The brief (page 33) admits that "The jury was instructed not to consider this evidence if without it a *clear* conclusion could be reached as to who began the difficulty."

This is the sound doctrine and in accordance with the rule stated by this court in *Wiggins* v. *People* (93 U. S., 467). Kerr thus states the rule: "Where the threats had not been communicated to the defendant, they are admissible only when the evidence leaves a doubt as to whether the defendant or the deceased was the aggressor at the time of the homicide." (Law of Homicide, sec. 396, citing many cases.)

To same effect, Rice on Criminal Evidence, sec. 362.

If this evidence had been excluded entirely, it could not have been hurtful to defendant, for on the question of self-defense he is the only witness to the facts of his theory of the case, and he leaves no doubt as to deceased

being the aggressor, and under the authorities this evidence was not properly admissible, for the acts of the deceased as testified to by him were not of a doubtful character. The other witnesses present the case in a wholly different aspect and at a different point of time, and uncommunicated threats could have no relevancy in respect to their testimony, which admitted no possibility of a theory of self-defense.

COMMUNICATED THREATS.

(Brief of plaintiff in error, page 35.) The portion of the charge here excepted to, in which the court said that in order to make communicated threats admissible it must be shown that deceased was doing some overt act indicating to defendant "that the deceased meant to take his life," is from Specification IX (brief 11), and from transcript, page 27. It is disconnected from parts of the charge to which it stands in immediate relation.

The judge goes right on to qualify and explain it, and all of this is omitted in the assignment and in the brief.

The attack is made on the last words, "that the deceased meant to take his life," and upon the implied exclusion of any other danger as a justification.

In view of this criticism, the effect of dislocating the extracted passage is made manifest by what follows.

In the succeeding paragraph and in immediate connection he shows that the defendant may kill "to prevent some felony upon his person."

Again, on the same page and in the same connection, he says:

> If the evidence in the case shows, at the time of the killing, that the deceased was making, really or

> apparently, a violent demonstration, then you may take into account, as the defendant had the right to take into account at the time, the communicated threats. (Tr., p. 27.)

Violent demonstration manifestly means a demonstration indicating an intent to do violence. It can have no reference to the boisterous manner or amount of physical exertion exhibited. This is the idea pressed in plaintiff's brief, page 36, but it seems palpably strained.

If there were any ambiguity or anything misleading in these passages, the court subsequently (Tr., page 28) charged fully and clearly the law on this subject in language framed by defendant's counsel as follows:

> Communicated threats, if proven, may be considered by the jury for the purpose of determining the question as to whether or not the acts and conduct of the deceased at the time of the killing were such as would lead a man of ordinary courage and prudence, situated as was the defendant, to believe that the deceased then and there designed to kill him, or to do him some great bodily harm, and whether or not there was imminent and impending danger, real or apparent, of such design being then and there accomplished.

If there were any error in the use of the words "meant to take his life," which is not cured, taking the whole charge on this subject into consideration, nevertheless it could not harm defendant, for he testified that deceased advanced upon him in an angry manner with his hand in his trousers pocket, and in reply to his question, "What are you going to do?" said, "Damn you, I will show you," at the same time making a movement with his left hand as if to draw a pistol.

This is on his theory of self-defense, and is the only testimony. There was no testimony going to show any assault less than a deadly one, and therefore in this matter the jury could not by any possibility have failed to consider the communicated threats.

In this connection, and in aid of this assignment, the brief of plaintiff in error (page 3) sets out an extract from the charge as follows:

> If this deceased young man was not at the time of the killing actually or apparently making a demonstration that would indicate a *deadly purpose*, then the communicated threats pass out of the case, because they can not be considered.

This portion of the charge was nowhere excepted to, and is not in any of the assignments of error, and it is insisted that it can not be looked to for any purpose here.

PROVOKING THE DIFFICULTY.

(Brief of plaintiff in error, page 36.) All that is said under this head is based on assignment No. 12. (Tr. 29 and 30.)

This assignment covers more than a page of the charge, and contains five distinct propositions.

First. One who first assaults another in a deadly way with a deadly weapon can not, no matter what may ensue upon the part of the assailed, set up such action to justify killing him on the ground of self-defense.

Second. One who goes to a place with a deadly weapon with the intent of having an affray can not invoke the doctrine of self-defense.

Third. One who provokes another by language or other device in order to get another to commence an assault so as to have a pretext for taking his life, can not say he acted in self-defense.

Fourth. And so when he agrees with another to fight.

All of these were excepted to together. The attention of the judge was not called to the particular ground of complaint.

If any one be sound the assignment fails.

There can be no question as to the soundness of the first, third, and fourth propositions, and they are not questioned. (See authorities *supra*.)

ACTUAL DANGER.

The portion of the charge objected to is taken out of its connection from page 26, and does not present in any sense what the judge charged upon the subject of self-defense.

The complaint is made against a paragraph taken from 93 United States, page 479, and special exception is taken to the language "if there be no actual danger at the time." The word "bare" is erroneously inserted before "justification." The proposition as stated is that, if there be no actual danger at the time, "a bare fear unaccompanied by any overt act indicative of the supposed intention will not warrant the party entertaining such fears in killing the other party by way of precaution." It will hardly be contended that a *bare fear* will justify killing even if there be apparent danger or actual danger.

Stating it in the affirmative it is that where an overt act is done a bare fear will justify the killing, if there be actual danger at the time.

If there be any error in this part of the charge it is in favor of the defendant, and for such error there can be no reversal. (*Harris* v. *State*, 7 Lea, 555; *State* v. *Parker*, 13 Lea, 222.)

CHARACTER OF DECEASED.

(Brief of plaintiff in error, page 39.) This exception is assignment No. 10 and is taken from the charge on page 27 of transcript. The judge said, "Of course there is no contention here as to the lawless and desperate character of the deceased." This meant his general character for peace or lawlessness in the community in which he lived. There was evidence introduced as to the character of defendant for peace. No evidence whatever was introduced as to the character of deceased for lawlessness. Every man is supposed to have a good character. When his character was not assailed it was not error for the judge to say to the jury that there was no contention in respect of the lawless and desperate character of the deceased.

The brief of plaintiff in error, page 40, adroitly confuses the question of character with the actual facts of going armed and making threats, all of which went to the jury as part of the *res gestæ*, without regard to the character of the deceased for peace or lawlessness.

DUTY OF DEFENDANT.

(Brief of plaintiff in error, page 40.) This is Specification XV of the brief, but is assignment 16 (Tr., p. 55), and is taken from the charge on page 36 of transcript.

It is one of several distinct propositions embraced in assignment 13. (Tr., p. 54.)

This was not excepted to alone. The only exception covering it appears on page 43 of transcript, and that embraced more than an entire page and three distinct propositions, all of which are covered by assignments 13 and 14. (Tr., pp. 53, 54.) If there be error in this fifteenth specification, it can not now be noticed, because it was not brought to the attention of the trial judge separately, but was embraced in an exception covering other propositions which were sound, as, for instance, the first proposition, as follows:

> If at the time of this killing it be true that the deceased was doing an act of apparent or real deadly violence, and that state of case existed, and yet the defendant at that time could have avoided the necessity of taking his life by the exercise of any reasonable means and he did not do that, because he did not exercise other reasonable means that would have with equal certainty saved his life, but resorted to this dernier remedy—under these facts and circumstances the law says he is guilty of manslaughter. (Tr., pp. 35, 42, 53.)

If there were error it was innocuous, for there was no evidence on the question of self-defense showing or tending to show that defendant made any mistake. His was the only testimony on this point. The charge, as is said

in brief of plaintiff in error (p. 40), was only abstract. It could not mislead the jury. It only stated what the law would be under a certain state of facts, but did not imply nor suggest their existence. (*Johnston* v. *Jones*, 1 *Black.*, 222; *Lancaster* v. *Collins*, 115 U. S., 227.)

REFUSED INSTRUCTIONS.

(Plaintiff in error brief, page 41.) This is upon *assignments of error* 17, 18, 19, 20, and 22 as they appear in the transcript pages 55, 56, and 58, and not upon the corresponding numbers in the specifications of errors in the brief.

The entire charge is not set out in the record, and it is affirmatively shown that a part is omitted. (Tr., p. 16.) The trial judge is presumed to have charged the law correctly unless the contrary affirmatively appear.

A common ground for refusing a request is that it has been sufficiently covered in the charge.

If it be objected in the revising court that the judge erred in refusing a request, the whole charge should be set out by the one assuming the burden of showing error and overcoming the presumption that arises in behalf of the trial judge, or it should be shown affirmatively in the bill of exceptions that the charge was silent or inadequate on the matter embraced in the request. It is the duty of the appellant to make up the bill of exceptions and show error, if any. There is no duty imposed upon the trial judge except to see that there are no false recitals in the bill. It may be ever so meager and he can not refuse to sign if it be true in its statements.

In *Worthington* v. *Mason* (101 U. S., 149) it was held that an exception for a refusal of a request for instruction would not be noticed if no evidence be set out in the bill of exceptions, and nothing appears to show affirmatively that there were facts before the jury to which the request was applicable.

In *Reagan* v. *Aiken* (138 U. S., 113), it was held as follows:

> That the law was fully given by the court to the jury we are bound to presume in the absence from the record of the entire charge, and that the court would, where the charge was not set out, presume that a request was refused because already fully given in the general charge. To same effect is *Railway* v. *Foster* (88 Tenn., 673).

Rule 4 as to setting out charge in record is only applicable to exceptions to what was charged, but does not apply in terms and can not apply in principle to exceptions on the ground of refusal to instruct, for such exceptions can not properly be considered by the reviewing court unless the entire charge be sent up.

If this proposition be sound none of the requests can be considered.

But it was not error to refuse them.

Nos. 17 and 18.

The judge sufficiently charged the law upon what the proof must show in order to convict as follows:

> We must be governed by a state of case that is proven beyond a reasonable doubt. (Tr., p. 16.)

> Unless one or the other of these conditions that are criminal is proven beyond a reasonable doubt he is entitled to an acquittal at your hands. (Tr., p. 18.)

Again, in the case of *Commonwealth* v. *Webster*, a celebrated case in the judicial history of this country, the supreme judicial court of Massachusetts stated in its charge that it was not sufficient to establish a probability, though a strong one, arising from the doctrine of chances that the fact charged against the prisoner was more likely to be true than the contrary, and said:

> The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt * * * if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so and in that case find him not guilty. (Tr., p. 33.)

Again:

> If you are not satisfied beyond a reasonable doubt of the guilt of this defendant by the light of the evidence that you may find to be true and by the principles of the law defining either one of these crimes that either one of them exist, your duty would be to find the defendant not guilty. (Tr., p. 37.)
>
> We must be governed by a state of case that is proven beyond a reasonable doubt; we must define that state of case accurately, concisely, and honestly. (Tr., p. 16.)
>
> Now the defendant in this case claims that there is no crime in the case; that he did nothing but what

> he had a right to do. If that is true he is entitled to a verdict of acquittal at your hands, or, more properly speaking, unless one or the other of these conditions that are criminal is proven beyond a reasonable doubt, he is entitled to an acquittal at your hands. (Tr., p. 18.)

These are plain, comprehensible, and unexceptionable statements of the law covering every essential element embraced in requests 17 and 18.

The requests as framed would perplex rather than aid a jury and would involve them in confusing distinctions and take them out of the plain path that ordinary minds would pursue.

If the charge be full and correct the court is not bound to reiterate it at the request of counsel and still less to employ his language. (*Rea* v. *State*, 8 Lea., 361; *Anthony* v. *L. and N. R. R.*, 132 U. S., 172; *Tucker* v. *United States*, 151 U. S., 170; *Coffin* v. *United States*, 156 U. S.)

The requests refused here were not the same as in *Coffin* v. *United States*, 156 U. S. That was a refusal to instruct upon the presumption of innocence. Besides in that case the entire charge was set out in the record (p. 124) *et seq.*, and thus it was shown affirmatively that the trial judge did not charge the full equivalent of the request. In the case at bar the record shows affirmatively that only a portion of the charge is set out.

No. 19.

The law covered by this request is fully and correctly charged, as is shown under assignment No. 1, *supra*.

No. 20.

This request was properly refused. It contains the following errors:

In the first paragraph it asks that the jury be directed to look to uncommunicated threats "in determining the frame of mind which the deceased had and entertained toward the defendant."

Such evidence is not relevant to show his state of mind, but as explanatory of his actions. His mind may have changed and his real intent be peaceable, and yet such threats would be relevant in respect of his acts and could, even contrary to his real intent, give them an aspect of hostility and so redound to the defendant's benefit.

The last proposition in this request is fatally defective. It asks an instruction of not guilty on the entire case, but upon states conditions that cover only the aspect of self-defense at the time and rightfully exercised. Under this request, if the jury believed that he went armed to the place to provoke and did provoke an affray, but had good reason to believe when he struck the fatal blow that he was in imminent danger, they would be bound to say not guilty. This being embodied in the request as an entirety vitiates it altogether. (*Beaver* v. *Taylor*, 93 U. S., 46; *Worthington* v. *Mason*, 101 U. S., 149; *Bogk* v. *Gossett*, 149 U. S., 26.) If this request were sound, there was no error in refusing it, for the whole matter contained in it had been fully and correctly charged upon.

No. 22.

This request embodied error and was properly refused. The last part is as follows: "And if there arises out of the

evidence a reasonable doubt as to whether or not the blow which killed the deceased was struck under the facts and circumstances as herein set out, then he is entitled to be acquitted." (Tr. p. 58.)

This is equivalent to saying, "You can not convict unless you believe beyond a reasonable doubt that each of the facts as set out did not exist." They might fail to believe beyond a reasonable doubt that some one of the material facts stated did not exist, or they might reasonably doubt its existence and believe beyond a reasonable doubt some other theory of the case that would warrant conviction.

The request is that if there be reasonable doubt as to the facts stated they must acquit. The statement is made up of separate facts, and so if there be a reasonable doubt as to whether or not any of the facts as stated existed, they must acquit. To convict they must believe every essential condition necessary to make up the crime beyond a reasonable doubt; but here, if any of the conditions essential or not essential be in reasonable doubt, the contention is they must acquit. This can not be true, for suppose the jury should believe beyond a reasonable doubt the converse of every fact stated in the request but one, which is to say that they had no reasonable doubt as to whether or not the facts stated, with one exception, existed, but were convinced to the contrary without doubt, and suppose they should doubt as to whether or not the excepted fact, as stated, existed, then there must be an acquittal under the request. To reasonably doubt the existence of any one fact is a reasonable doubt as to whether or not the blow was struck under the facts set

out. Now, test it. Suppose the fact in reasonable doubt is whether he went there for the purpose of having a difficulty. This breaks the hypothesis. And suppose they believe, beyond a reasonable doubt, that he struck, not in self-defense and not believing himself to be in danger. In this view of the case it would make no difference about the purpose in going, and the jury could convict, but under the request they could not, because that one fact is in doubt.

The facts are independent and their existence not interdependent; they are testified to by different and conflicting witnesses. They are links that make up the hypothetical chain. For the State you say you must believe all of certain facts beyond a reasonable doubt to convict; if reasonable doubt of any, you must acquit. It is not equivalent to say if you doubt any of a set of facts set up in defense you must acquit, for some may be not doubted, the converse believed may be without doubt, and so render their existence or nonexistence immaterial, and so a reasonable doubt as to the existence or nonexistence of facts set up in defense which become immaterial when other facts are believed can cut no figure.

Suppose they had a reasonable doubt on every proposition except that defendant believed he was in danger. They ought not to acquit, and yet, having a reasonable doubt as to every fact but one, and none as to that, they must acquit.

Respectfully submitted.

J. M. DICKINSON,
Assistant Attorney-General.

IN THE

Circuit Court of the United States

For the Northern District of Illinois.

THE UNITED STATES OF AMERICA

vs.

EUGENE V. DEBS, GEORGE W. HOWARD, SYLVESTER KELIHER, LOUIS W. ROGERS, JAMES HOGAN, WILLIAM E. BURNS, ROY M. GOODWIN, AND MARTIN J. ELLIOTT.

Information for Contempt.

And now come the defendants, Eugene V. Debs, George W. Howard, Sylvester Keliher, Louis W. Rogers, James Hogan, William E. Burns, Roy M. Goodwin, and Martin J. Elliott, and pray that a writ of error may be allowed herein from the Supreme Court of the United States to the judgment of imprisonment entered against them in this cause by said circuit court of the United States for the northern district of Illinois on the 14th day of December, in the year 1894; and the said defendants assign for error herein—

First. That the injunction for violation of which they were sentenced as aforesaid was ordered in a case of which the said court had no jurisdiction nor right to hear and determine the cause.

Second. That the court erred in holding and deciding that the bill on which the said injunction was granted might be maintained in the name of the United States under the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved the 2d day of July, in the year 1890, and particularly under section 4 of said act, in this: that the said act, in so far as it purports to grant jurisdiction to the circuit courts of the United States to restrain or enjoin violations of its provisions, is repugnant to the Constitution of the United States, and particularly to the fifth and sixth amendments thereto, in that it might thus be invoked to permit prosecutions for infamous crimes without indictment and criminal prosecution without trial by jury.

Third. That this being in effect a proceeding to punish a criminal contempt not committed in the presence of the court, the said court erred in not discharging the defendants upon their answers and in not holding such answers to be conclusive in this proceeding.

Fourth. That the said court erred in not quashing the information and supplemental information filed herein and in holding the same to be sufficient.

Fifth. That the said court erred in trying the said defendants on information and without indictment or presentment of a grand jury.

Sixth. That the said court erred in trying the said defendants without a jury.

Seventh. That the said court erred in holding that the said bill of the United States on which the injunction claimed to be violated was granted made or stated any case cognizable in a court of equity or of which the said court could take jurisdiction and cognizance or in which said

court could order such an injunction or make any order therein against these defendants.

And the said defendants respectfully pray that their writ of error may be allowed herein according to law, and that an order may be entered herein fixing the amount of the bond to be filed by these defendants, and that a citation may issue according to law.

EUGENE V. DEBS,
GEORGE W. HOWARD,
SYLVESTER KELIHER,
LOUIS W. ROGERS,
JAMES HOGAN,
WILLIAM E. BURNS,
ROY M. GOODWIN,
MARTIN J. ELLIOTT,
By C. S. DARROW and
S. S. GREGORY,
Their Attorneys.

LYMAN TRUMBULL, *Of Counsel.*

[Endorsed:] Circuit court of the United States for the northern district of Illinois. The United States *vs.* Eugene V. Debs *et al.* Petition for writ of error, supersedeas, &c. Assignment of errors. Lyman Trumbull, C. S. Darrow, and S. S. Gregory, for def'ts.

This petition was presented to me as associate justice of the Supreme Court of the United States, assigned to the seventh circuit. Counsel is directed to present the same to the Supreme Court of the United States, in open session, for such action thereon as that Court may deem it proper to make.

January 12, 1895.

JOHN M. HARLAN,
Asso. Justice Sup. C't U. S.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 11, Original.

EX PARTE: IN THE MATTER OF EUGENE V. DEBS ET AL., PETITIONERS.

PARTS OF INFORMATION HERETOFORE OMITTED IN PRINTING.

317½ (Omitted from p. 23 of printed exhibits.)

enjoining and prohibiting the above-named defendants, among other things, "from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employés of said railroads, who are employed by such railroads and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business or the transportation of passengers and freight between and among the States, to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force or violence, from entering the service of any of the said railroads, and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid;" a copy of which said writ of injunction is hereto attached, marked "Exhibit A," and made a part of this information [reciting same].

318 (Omitted from p. 25 of printed exhibits.)

On the 1st day of July, 1894, the following telegram was transmitted to an officer of said American Railway Union by the defendant Debs, to wit:

"We go out on the Santa Fé at 11.30 a. m. tomorrow."

On the same day the following telegram was sent by one Phelan, an officer of said American Railway Union, from Cincinnati, to wit:

"To E. V. Debs, Chicago:

Big Four signed agreement, and are not to be trusted.

PHELAN."

To this telegram the following reply was sent, to wit:

"Hold Big Four road. They cannot settle until all settle.

DEBS."

On the 2d day of July, the said defendant Debs sent to one Courthead, an officer of said Union, or of a local union, the following telegram, to wit:

"CHICAGO, *July* 2, 1894.

To Courthead, South Butte, Montana:

The general managers are weakening. If strike is not settled in forty-eight hours, complete paralysis will follow. Potatoes and ice are out of sight. Save your money and buy a gun.

E. V. DEBS."

Also, on the same date, to an officer of the local union in Colorado, the following telegram, to wit:

"The Pullman boycott applies to the Rio Grande Western, as well as all other roads. Enforce it completely.

E. V. DEBS."

Also, on July 3d, 1894, the following telegram, to wit:

"To M. L. West, Mattoon, Ill.:

All right. This is authority to call out men.

DEBS."

On the same date, the following telegram:

"CHICAGO, *July* 3*d*, 1894.

To —— Steward, Gunnison, Colo.:

This is authority to call out men in your vicinity.

DEBS."

Also the following telegram:

"CHICAGO, *June* 29, 1894.

To George H. Burnett or W. W. Catlin, Livingston, Montana:

Not a wheel shall turn until the whole railroad trouble is settled.

E. V. DEBS."

Also, on the 3d day of July, the following telegram:

"CHICAGO, 7, 3, 1894.

To W. F. Smith, Grand Junction, Colo.:

It will take more than injunctions to move trains. Get everybody out. We are gaining ground everywhere.

E. V. DEBS."

On and after the 4th day of July, 1894, and after the service of said writ of injunction upon all of the above-named defendants, certain telegrams and orders were transmitted to the several officers of the American Railway Union, or of local unions, named therein, of which the following are copies, to wit:

"CHICAGO, *July* 4, 1894.

To C. S. McAuliff, Milwaukee, Wis.:

Get switchmen and firemen and all others on Milwaukee system out immediately. Put committee in charge. Wire name of chairman. We are gaining grandly everywhere. Strike now reaches eastern Ohio. We will surely win.

E. V. DEBS."

319 In pursuance of this authority a large number of switchmen and firemen and other employés of said Milwaukee system were ordered by said McAuliff and other officers of the said American Railway Union or local unions to leave, and did leave in a body the service of said company, thereby hindering, preventing and delaying the transportation of interstate commerce over and upon the lines of said Chicago, Milwaukee and St. Paul Railway Company.

"CHICAGO, *July* 5, 1894.

T. J. Burke, Rock Island, Ills.:

Have your men stand pat. This is authority for you to call on the 'Q' men. Ask them to withdraw from the service in a body. Put a committee in charge of that road, and wire name of chairman.

E. V. DEBS."

"CHICAGO, *July* 8, 1894.

L. P. Green, Kankakee, Ills.:

Use your utmost influence to get the co-operation of all roadmen. Outlook splendid this morning. Get action on I. I. & I. quick as possible.

E. V. DEBS."

"CHICAGO, *July* 6, 1894.

We have assurance that within 48 hours every labor organization in this country will come to our rescue. The fight is on, and our men are acquitting themselves like heroes. Here and there one weakens, but our cause is strengthening by a dozen going out in his place. Every true man must quit now and remain out until the fight is won. There can be no half-way ground. Men must be for us or against us. Our cause is gaining ground daily, and our success is only a question of a few days. Do not falter in this hour. Stand erect. Proclaim your manhood. Labor must win now or never. Our victory will be positive and complete. Whatever happens, do not give credence to rumors and newspaper reports.

E. V. DEBS."

The foregoing telegram was sent to seven different persons on the Chicago and Eastern Illinois railway; thirty-one different persons and places concerning the Union Pacific; thirty persons and places concerning the Northern Pacific; twenty-four on the Santa Fé system; seven on the Illinois Central; seven to different persons and places concerning the Rock Island; seven, Chicago, Milwaukee and St. Paul; eleven on the Wabash; five on the Chicago and Alton; two on the Burlington; seven on the Chicago and Great Western; two on the Wisconsin Central; seven on the Big Four; one to Alexander Shield, Hammond, Indiana, on the Monon system; one on the Erie system; two on the Michigan Central, and others.

Also the following:

"From CHICAGO, *July* 4, 1894.

To L. F. Murphy, Goodland, Kan.:

Get Rock Island men out in all departments immediately. Elect committee. Wire name of chairman.

E. V. DEBS."

"From CHICAGO.

To Charles Fink, Oakland, Cali.:

To call out the troops was an old method of intimidation. Commit no violence. Have every man stand pat. Troops cannot move trains. Not scabs in world to fill places and more occurring hourly.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To H. E. Sarber, Garrett, Ind.:

The B. & O. system has been ordered out. Have all classes of employés withdraw from service immediately. Pledge them full support whether members or not. Commit no violence. Elect committee take charge. Wire name chairman. The B. & O. officials are trying to intimidate their employés and are also looking for scabs in the eastern cities. By all means have them shut off. The employés of all railroads will stand together. None will return to work until all return. Not scabs in world to fill vacancies. Gaining ground everywhere.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To J. L. Cordial, Litchfield, Ill.; W. Ammen, 343 Wildwood Ave., Kankakee, Ill.; Chas. St. Clair, Mt. Carmel, Ill.; Ed. Morrow, Rankin, Ill.; F. Williams, Seneca, Ill.; H. C. Stovel, Urbana, Ill.; H. L. Woods, Benton Harbor, Mich.; R. W. Sevens, Bedford, Ind.; James Curry, 75 Dawson St., Ft. Wayne, Ind.; H. L. Lathe, Lafayette, Ind.; F. L. Banman, 405 E. Ninth St., Michigan City, Ind.; Jesse York, Monon, Ind.; W. A. Crabb, 310 East Syracuse St., New Albany, Ind.; F. L. Wade, Peru, Ind.; L. F. Naylor, 911 North Seventh St., Terre Haute, Ind.; G. G. Ayres, Wabash, Ind.; W. A. Cally, 430 W. Canal St., Marion, Ohio; M. R. Miller, 179 Dana St., Cleveland, Ohio; C. H. Shaifer, Benton Harbor, Mich.:

Big Four, Illinois Central, Wabash, Monon, Lake Shore roads are now on strike at nearly every point. Take action to have all classes of employés withdrawn from service. Pledge full support to all, whether members or not. Elect good committee for each road. Wire name of chairman and on what road employed. Gaining ground everywhere. Members old organizations flocking to our assistance.

E. V. DEBS."

320 "From CHICAGO, *July* 4, 1894.

To O. L. Vincent, Clinton, Iowa:

Pay no attention to rumors. We are gaining ground everywhere. Don't get scared by troops or otherwise. Stand pat. None will return to work until all on every return. If they do they are scabs and will be treated as such. Not men enough in the world to fill vacancies and more occurring hourly.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To R. Samson, Peoria, Ill.:

Request all men on roads that in your judgment can assist in enforcing Pullman boycott to withdraw from the service immediately. Elect committee from each road. Wire name of chairman, mentioning the road he represents. Promise full protection to all assisting, whether members or not. We are gaining ground and will surely win.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To George Blank, Whiting, Ind.:

Tie Standard oil works solid. We call out Marine in the morning.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To W. L. Dougherty, Frankfort, Ind.:

The Monon, Clover Leaf and Vandalia have been ordered out. Charleston has been notified. Elect good committee for each road,

and in wiring name of chairman to this office, state road he represents.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To Miles Devinev, Peoria, Ill.; H. W. Shimer, Decatur, Ills.; Lee Wetz, Mattoon, Ills.; E. R. Grisom, Evansville, Ind.:

This authority to call out the Peoria, Danville and Eastern. Put committee in charge each road. Wire name chairman, stating road each represents.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To Wm. Goode, Trenton, Mo.:

Get everybody together and they will receive protection, whether members or not. Get all in Union you can. Work on these lines and wire result.

E. V. DEBS."

"From CHICAGO, *July* 4, 1894.

To A. P. Merriman, Memphis, Tenn.:

Pledge protection to all assisting. Tie up all roads that insist on handling boycotted cars. Elect good committee each road involved. Wire names of chairmen, stating which road employed.

E. V. DEBS."

"From CHICAGO, *July* 5, 1894.

To John E. Marrion, 9017 Ontario Ave., South Chicago:

Get your men out immediately. Report name of chairman in charge to L. W. Rogers.

E. V. DEBS."

"From CHICAGO, *July* 5, 1894.

To M. J. Holland, Denver, Colo.:

This is authority for you to call out all employés of Denver & Rio Grande, asking them to assist us in this fight, pledging full protection to them, whether they are members or not. Engineers and others all over the country are standing by us. We are gaining ground rapidly.

E. V. DEBS."

"From CHICAGO, *July* 5, 1894.

To James Curry, Ft. Wayne, Ind.:

Call out all loyal employés on roads named immediately. We are gaining ground. The lines are sharply drawn. All who work are assisting capital defeat labor. We will all stand together.

E. V. DEBS."

"From CHICAGO, *July* 5, 1894.

To L. Bosen, Ft. Wayne, Ind.:

Have Nickel Plate men withdrawn from the service in a body. Promise full support to all, whether members or not. Commit no violence. We are gaining ground everywhere.

E. V. DEBS."

"From CHICAGO, *July* 5, 1894.

To F. M. Brown, Centralia, Ill.; W. D. Thornton, 103 Market street, Jackson, Tenn.:

Have all Illinois Central employés withdrawn from the service immediately. Appoint a good committee. Wire name of chairman. We are gaining ground everywhere. Pay no attention to rumors from corporation lickspitters.

E. V. DEBS."

321 "From CHICAGO, *July* 6, 1894.

To Mark Waldo, Columbus, O.:

Adopt measures to have Big Four employés to assist us. They are out solidly at nearly all other places. All trains, freight and passenger, out of Chicago today, are abandoned.

E. V. DEBS."

"From CHICAGO, *July* 6, 1894.

To Wm. Callard, Mattoon, Ill.:

Have the Wabash employés withdrawn from the service immediately. Full protection is guaranteed to all who assist.

E. V. DEBS."

"From CHICAGO, *July* 6, 1894.

To D. D. McInnis, Duluth, Minn.; C. H. Richards, St. Paul, Minn.:

Have all employés of the St. Paul and Duluth withdrawn from the service immediately. Promise full protection to all who assist us whether members or not.

E. V. DEBS."

"From CHICAGO, *July* 6, 1894.

To M. King, Glenn's Ferry, Idaho:

The marshal cannot injure you. He is simply assisting capital to enslave his brother. He does not understand his business.

E. V. DEBS."

Upon July 8, 1894, the defendant Debs sent telegram of which the following is a copy, to wit:

"Frank Shorts, Kent, Ohio:

You are hereby requested to assist us in the present strike, by having all concerned withdrawn from the service. Elect good committee and wire the name of chairman of each road. Be particular

to state road he represents. Commit no violence. All concerned of all roads will stand together. None will return. We are gaining ground rapidly. Pledge full protection to all whether members or not.

E. V. DEBS."

On the same day, the same telegram was sent to one O. W. Gibbs, of Marion, Iowa, and to many other railway employés upon the different lines named in said writ of injunction.

Also the following telegram:

"CHICAGO, *July* 6, 1894.

To S. D. Hicks, Savanna:

A dozen going out in his place. Every true man must quit now and remain out until the fight is won. There can be no half-way ground. Men must be for or against us. Our cause is gaining ground daily and our success is only a question of a few days. Do not falter in this hour. Stand erect. Proclaim your manhood. Labor must win now or never. Our victory will be positive and complete. Whatever happens, do not give any credence to rumors and newspaper reports.

EUGENE V. DEBS."

Also the following telegram:

"CHICAGO, *July* 7, 1894.

F. R. Mills, Garrett:

You are hereby requested to assist us in the present strike, by having all employés withdraw from the service. Elect good committee for each road. Wire name chairman each road. Commit no violence. Balto. & Ohio tied up tight at Chicago, South Chicago and Garrett. Strikers there ask your assistance. Employés on all roads will stand together and none will return until all return. We are gaining ground rapidly and pledge full support of American Railway Union, all assisting whether members or not.

E. V. DEBS."

"CHICAGO, 7, 9, 1894.

S. W. Rains, Mt. Vernon, Ill.:

Call out air line and let it be understood this trouble is one of capital against labor. This is no contest in which children or childish men have a part. Strong men and broad minds only can resist the plutocracy and arrogant monopoly. Do not be frightened at troops, injunctions, or the subsidized press. Quit and remain firm. Commit no violence. American Railway Union will protect all, whether members or not, when strike is off. We have gained strength daily since strike began.

E. V. DEBS."

Answer:

"MT. VERNON, *Ill.*, 7, 9, '94.

E. V. Debs, Ill.:

Air line been out at Mt. Vernon and Princeton for a week. Nothing but passenger trains moved during this time. Every man firm.

S. W. RAINS."

322 (Omitted from p. 27 of printed exhibits.)

"CHICAGO, *July* 12, ——.

To the railway managers.

GENTLEMEN: The existing troubles growing out of the Pullman strike having assumed continental proportions, and there being no indication of relief from the widespread business demoralization and distress incident thereto, the railway employés, through the board of directors of the American Railway Union, respectfully make the following proposition as a basis of settlement:

They agree to return to work in a body at once provided they shall be restored to their former positions without prejudice, except in cases, if any there be, where they have been convicted of crime.

This proposition looking to an immediate settlement of the existing strike on all lines of railway is inspired by a purpose to subserve the public good. The strike, small and comparatively unimportant in its inception, has extended in every direction until now it involves or threatens not only every public interest, but the peace, security, and prosperity of our common country. The con-

323 test has waged fiercely. It has extended far beyond the limits of interest originally involved, and has laid hold of a vast number of industries and enterprises in nowise responsible for the differences and disagreements that led to the trouble. Factory, mill, mine, and shop have been silenced, widespread demoralization has sway. The interests of multiplied thousands of people are suffering. The common welfare is seriously menaced. The public peace and tranquility are imperiled. Grave apprehensions for the future prevail.

This being true, and the statement will not be controverted, we conceive it to be our duty as citizens, and as men to make extraordinary efforts to end the existing strife and approaching calamities whose shadows are even now upon us. If ended now the contest, however serious in some of its consequences, will not have been in vain. Sacrifices have been made, but they will have their compensations. Indeed, if lessons shall be taught by experience the troubles now so widely deplored will prove a blessing of inestimable value in the years to come.

The differences that led up to the present complications need not now be discussed. At this supreme juncture every consideration of duty and patriotism demands that a remedy for existing troubles be found and applied. The employés propose to do their part by meeting their employers half way. Let it be stated that they do not impose any condition of settlement except that they be returned to

their former positions. They do not ask the recognition of their organization, or any organization.

Believing this proposition to be fair, reasonable, and just, it is respectfully submitted, with the belief that its acceptance will result in the prompt resumption of traffic, the revival of industry, and the restoration of peace and order.

Respectfully, E. V. DEBS, *President*,
G. W. HOWARD, *Vice-president*,
SYLVESTER KELIHER, *Secretary*.
American Railway Union."

(Omitted from p. 27 of printed exhibits.)

"General offices American Railway Union, 421 Ashland block.

CHICAGO, To the Panhandle Yard men, *July* 2, 1894.

To the Panhandle Yard men, Greeting:

Please execute the orders of Mr. John Brenock in reference to the removal of dead stock from the stock yards to Globe station. This is issued by order of the board of directors in the interest of public health.

EUGENE V. DEBS, *President*."

(Omitted from p. 27 of printed exhibits.)

"We are in a condition to keep the strike on for months. Nothing but armed intervention today permits the moving of trains. Throughout that great stretch of country which lies west of the Mississippi river our men are steadfast and willing to wait until the bitter end. You will notice that it is impossible to buy a ticket to the Pacific coast in Chicago today, except by way of the Great Northern road, over which no Pullman cars are run and against which we have no possible grievance. This shows the line on which our future campaign is to be carried. We shall keep the men of the West, where the air is purer and wholly freer from plutocratic combinations, in line with our ideas. We shall persist in our work of organization throughout the East. As a road throughout the country hitherto unorganized by us falls into line we shall call it out. And we shall keep on doing this until the very end of all things.

If our present struggle, based as it is on motives wholly disinterested, be successful, there is no wage-earner in the land who will not feel its beneficent effects before the year closes.

And if this is true when the command of the so-called 'arteries of commerce' fall into our hands and the trades unions which have given us comfort require reciprocation from us, we and we alone are in a position to give them material assistance. This is an axiom, and I believe no one will disagree with me."

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 11, Original.

EX PARTE: IN THE MATTER OF EUGENE V. DEBS ET AL.

PETITION FOR A WRIT OF HABEAS CORPUS.

EXHIBITS.

	Original.	Print.
Bill of complaint	1	3
Injunction order	8	14
Subpœna and return	10	17
Injunction	12	18
Order adjudging parties guilty of contempt	315	22
Information for attachment	317	23
Order overruling motion to dismiss the information	325	28
Answer of defendants	328	28
Note	340	35

C. S. DARROW,
S. S. GREGORY,
Attorneys for Petitioners.

LYMAN TRUMBULL, Esqr.,
Of Counsel.

1 Pleas in the circuit court of the United States for the northern division of the northern district of Illinois, in chancery sitting, at the United States court-room, in the city of Chicago, in said division and district, before the Hon. William A. Woods, circuit judge of the United States for the seventh circuit, on Friday, the fourteenth day of December, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the one hundred and nineteenth year.

S. W. BURNHAM, *Clerk.*

THE UNITED STATES *vs.* EUGENE V. DEBS *et al.* } 23421. In Chancery.

Be it remembered that on this day, the second day of July, 1894, came The United States of America, by Thomas E. Milchrist, district attorney of the United States for the northern district of Illinois, and filed in the clerk's office of said court its bill of complaint; which said bill of complaint is in the words and figures following, to wit:

2 In the Circuit Court of the United States, Northern District of Illinois.

UNITED STATES OF AMERICA, Complainant,
vs.
EUGENE V. DEBS, GEORGE W. HOWARD, L. W. RODGERS, SYLVESTER KELIHER, THE AMERICAN RAILWAY UNION, and Others.

Your orator, The United States of America, by Thomas E. Milchrist, district attorney of the United States for the northern district of Illinois, under the direction of Richard Olney, Attorney General of the United States, brings this its bill of complaint against Eugene V. Debs, George W. Howard, L. W. Rodgers, Sylvester Keliher, the American Railway Union, Lloyd Hodtchkins, A. Parzybok, H. Elfine, James Hannan, John Mastenbrook, William Smith, Edward O'Neil, Charles Nailer, John Duffy, William McMullen, E. Shelly, Fred. Ketchum, John W. Doyle, and others whose names are not known, and thereupon your orator complains and respectfully represents to the court and alleges as follows:

(1.) That the following-named railroad companies, to wit:
Atchison, Topeka & Santa Fé Railroad Company,
Baltimore & Ohio railroad,
Chicago & Alton railroad,
Chicago & Eastern Illinois railroad,
Chicago & Erie railroad,
Chicago & Grand Trunk railway,
Chicago & North-western railway,
Chicago & Western Indiana railroad,

Chicago, Burlington & Quincy railroad,
Chicago Great Western railway,
Chicago, Milwaukee & St. Paul railway,
Chicago, Rock Island & Pacific railway,
Cleveland, Cincinnati, Chicago & St. Louis railway,
Illinois Central railroad,
Lake Shore & Michigan Southern railway,
Louisville, New Albany & Chicago railway,
Michigan Central railroad,
New York, Chicago & St. Louis railroad,
Pennsylvania Company,
Wisconsin Central lines,
Wabash R. R.,
Union Stock Yard & Transit Company,

are and at all the times hereinafter mentioned were each a corporation duly created by and existing under the laws of one of the United States and chartered and organized by the laws of such State for the purpose of continuously doing business of a common carrier of passengers and freight generally, and of carrying on as such common carrier the business of general transportation of passengers and freight between the States of Illinois, Indiana, Michigan, Wisconsin, Minnesota, Kentucky, Iowa, Missouri and many other States of the Union; that the aggregate length of railroad owned and operated by said railroad companies exceeds one hundred and twenty thousand miles; that each of said several railroads runs into two or more different States and has lines of road owned and operated by it in two or more different States and is and at all the times hereinafter mentioned was engaged in the general transportation of passengers and freight between and among different States and subject to the provisions and requirements of the act of Congress approved February 4, 1887, and known as the interstate commerce act, and the several amendments thereof and additions thereto, and also is and at all the times hereinafter mentioned was subject to each and all of the laws of the United States and acts of Congress relating to interstate transportation of passengers and freight, or relating in any way to the conduct of interstate commerce and business; that the number of passengers
3 annually carried by said railroads in the course and as a part and by way of interstate commerce, into the city of Chicago from other States than Illinois, and out of Chicago into other States than Illinois, is more than 12,000,000, and that the quantity of freight annually carried by said railroads hereinbefore mentioned into the city of Chicago from other States than Illinois and out of the city of Chicago to other States than Illinois are many million tons. That each one of said railroads is also and at all the times hereinafter mentioned was employed and required by the United States and under obligation through the laws of the United States to carry regularly and daily upon numerous trains, the mails of the United States, and that each of said railroads is under contract with the United States to so continuously and daily upon its regular trains carry the mails of the United States upon stated terms and for a

long period yet to ensue; that under and according to the terms of such contracts of said railroads with the United States regulating the carriage of the mail of the United States upon them, each of said railroads is and for the unexpired period of such contract will be required to carry the mails as aforesaid at definite hours of the day and night and upon certain specified trains, having a definite hour of starting and within a definite time fixed by such contract for the delivery of the mails; that all of said railroads are and at all the times hereinafter mentioned were by statute of the United States post-roads of the Government, and many of said railroads are and at all the times hereinafter mentioned were required by act of Congress of the United States at any and all times to carry troops and military forces of the United States and provisions, munitions and general supplies therefor; that said Atchison, Topeka & Santa Fé railroad and Wisconsin Central railroad are in the hands of receivers appointed by the United States court, and have been for some time past; that at the city of Chicago, in the State of Illinois, is resident a great population engaged in many and most extensive industries necessary for the support and welfare of such population and requisite for and most intimately connected with the business and welfare of the country; that among such industries at Chicago are great manufactories of various kinds and great food producing and distributing establishments for the maintenance and uninterrupted business of which said railroads have continuously heretofore until interrupted as hereinafter set forth, brought into the city of Chicago from States other than Illinois, great numbers of cattle, sheep and hogs and great quantities of wheat, corn and other agricultural products; and for the continuous maintenance and business of which manufactories and establishments and of all other industries and business enterprises in the city of Chicago, it is and continuously hereafter will be vital and necessary that said railroads should continue uninterruptedly and without hindrance to so bring into Chicago from States other than Illinois the products and materials and supplies used in such businesses and enterprises; that it also is and continuously hereafter will be vital and indispensable for the continued maintenance and conduct and the uninterrupted business of such manufactories, establishments and all other industries and enterprises in and about the city of Chicago, that such railroads should hereafter be free to and in fact should without hindrance carry and transport the products of such businesses and enterprises from the city of Chicago to the States of the Union generally outside of Illinois; that the continuous free and uninterrupted and untrammelled transportation between the States into which as aforesaid such various lines of railroad run, of passengers thereon and the like continu*ance* free, uninterrupted and untrammelled transportation between the States into which said lines of railroad run as aforesaid of the freight, materials, supplies and products of all such manufactories, food producing and distributing establishments and all other businesses and enterprises in the city of Chicago is and continuously hereafter will be necessary for the existence and further continuance of any and all of such businesses

and enterprises. And that if the interstate transportation of passengers or freight by said railroad companies and receivers upon their lines of railroad aforesaid shall be or is permitted to be stopped or materially interfered with or hindered by defendants or anybody else in the manner hereinafter described or in any other way, whatsoever, then and in such event the general interstate business and commerce in which the people of Chicago and vicinity and of the other States and places of the United States are engaged, will necessarily cease and such interstate business of the community of Chicago and of other communities of the United States having commercial or industrial relations therewith will necessarily come to an end. That the products, natural and manufactured, of the States through and into which the said several railways are operated and which enter into and constitute the sum of interstate trade and traffic between said several States, will, unless the acts and doings hereinafter more particularly described are prevented and restrained, cease to enter into or form a part of such commerce, and the people of said several States will be prevented from dealing in said articles, natural and manufactured, or in the great branches of interstate commerce relating to such articles.

(2.) Your orator further shows that the defendant Eugene V. Debs is president, and defendant George W. Howard is vice-president, and defendant Sylvester Keliher is secretary, and defendant L. W. Rogers is a director of a certain association or organization known as the American Railway Union. That in the month of May, 1894, there arose some difference or dispute between the Pullman Palace Car Company, a corporation engaged in the business of manufacturing railroad cars, and its employés, at the town of Pullman in the State of Illinois, the result of such dispute being
4 that said employés or a considerable portion of them left the service of said Pullman Palace Car Company. That thereafter the said defendants, Eugene V. Debs, George W. Howard, Sylvester Keliher and L. W. Rogers, officers as aforesaid of said American Railway Union, combining together and with others to your orator unknown, with the purpose to compel an adjustment of the said difference and dispute between the said Pullman Company and its employés as aforesaid, caused it to be given out through the newspapers of Chicago, Illinois, and generally, that the said American Railway Union would at once create a boycott against the cars manufactured by said Pullman Palace Car Company, and that in order to make said boycott effective the members of said American Railway Union, who are some of them employed as trainmen or switchmen or otherwise, in the service of the railroads hereinbefore mentioned, which railroads or some of them are accustomed to haul the sleeping cars manufactured by the said Pullman Palace Car Company, would be directed to refuse to perform their usual duties for such railroad companies and receivers, in case such railroad companies thereafter attempted to haul said Pullman sleeping cars. That in pursuance to such plan of boycott the said defendants, including said Debs, Howard, Rogers, Keliher and others with them combining and conspiring, have already prevented divers

railroads having lines out of said city of Chicago from operating their trains, and have to a large extent deprived said railroad companies of the power to run their trains or perform their usual duties as common carriers of passengers and are still combining and conspiring together to extend such proposed boycott against Pullman sleeping cars, by causing strikes among employés of all railroads attempting to haul the same.

Your orator further shows that the said defendants, including said Debs, Howard, Keliher and Rogers, and others members of said American Railway Union, and other persons whose names to your orator are unknown, well knew the facts in this paragraph set forth with reference to the necessity for the use of said sleeping cars in the operation of the business of said railroad company and receivers as such common carriers; and well knew of the existence of said contracts between said railroad companies, or some of them, and said Pullman Palace Car Company, as well as of the contracts, laws and regulations between the said railroad companies and receivers and the United States with reference to the carrying of the mails; and well knew the fact that said sleeping cars were and of necessity must be carried upon the trains of said carriers with cars carrying said United States mails. And your orator avers that the said defendants entered into the conspiracy hereinbefore set forth with the intent and for the purpose of preventing the said railroad companies and receivers and each of them from performing its duties as a common carrier, and from preventing them and each of them from operating its regular passenger trains constituted as hereinbefore set forth and for the purpose of injuring and obstructing the business of said railway companies and receivers as common carriers and with the intent and purpose of interfering with and restraining the regular and customary transportation of passengers and freight between and among the States traversed by said lines of railway.

And your orator further shows that said defendants, for the purpose and with the intent of compelling said railway companies and receivers to cease and desist from hauling said Pullman sleeping cars upon said trains, did further conspire and combine together to induce the trainmen, switchmen and other employés of said railway companies who were members of the said American Railway Union to leave the service of said companies and receivers, and did further conspire and combine together to prevent said railway companies and receivers from securing other persons to take the place of such of their said employés as by reason of such inducements should leave the service of said railway companies.

And your orator further shows that said defendants, Debs, Howard, Rogers, Keliher, and other officers and directors of said American Railway Union, in pursuance of said unlawful purpose and conspiracy, did issue and promulgate and cause to be issued and promulgated certain orders, requests, notifications and instructions to the members of said American Railway Union in the service of said railway companies and receivers to leave the service of said companies and receivers, and to prevent the said companies and

receivers from operating not only their said passenger and mail trains, but all the trains which they were customarily engaged in operating.

And your orator further shows that said defendants have asserted and continue to assert that they can and will tie up, paralyze and break down any and every of said railway companies and receivers, which may or does refuse to accede to their demands, and your orator further avers that it is the purpose and intention of said defendants so conspiring and combining together as aforesaid, to so obstruct and cripple the business of said companies as to prevent them from performing their duties as common carriers between and among the several States and their obligations as such to the public.

And your orator further shows that under the instructions, commands and requests of said defendants, large numbers of the employés of said railway companies and receivers have left the service of said companies and receivers; that the said defendants, including Debs, Howard, Rogers, Keliher and other members of said American Railway Union and other persons whose names are to your orator unknown, in pursuance of their said plan of assisting the employés of said Pullman Palace Car Company in their dispute with said company, and in pursuance of their general design and conspiracy to stop the interstate business of railway companies hereinbefore named, did also conspire and unlawfully combine and associate themselves together with the intent and for the purpose of interfering with, restraining and stopping any and all of the numerous important and vital kinds of interstate business and commerce, other than railroad transportation, between the State of Illinois and the other States of the Union, which are, and necessarily must be, dependent upon the continuous and untrammelled operation of said railroads and conduct of their interstate business and running of their trains, and upon the uninterrupted and successful continuance of which general interstate business and commerce, other than transportation, the livelihood and welfare of the population of the city of Chicago and of the other places in the United States having commercial and industrial dealings with the city of Chicago largely depend.

And your orator further charges that said defendants aimed and intended and do now aim and intend in and by the said conspiracy and combination, to secure unto themselves the entire control of the interstate, industrial and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial or commercial enterprises save according to the will and with the consent of the defendants.

(3.) Your orator further avers that in pursuance of said combination and conspiracy and to accomplish the purpose thereof as hereinbefore set forth, the said defendants Debs, Howard, Rogers, Keliher and others, officers of said American Railway Union, issued or caused to be issued the orders and directions as above set forth,

and that in obedience of such orders and in pursuance of said conspiracy and combination, numerous employés of said railroad companies and receivers unitedly refused to obey the orders of said employers or to perform the usual duties of such service, and many others of such employés quit such service with the common purpose and with the result of preventing said railroad companies and receivers from operating their said railroads and from transporting the United States mails, and from carrying on or conducting their duties as common carriers of interstate traffic.

Your orator further avers that, pursuant to said combination and conspiracy, and under the direction as aforesaid of said officers and directors of said American Railway Union, said other defendants and other persons whose names are to your orator unknown, proceeded by collecting together in large numbers, by threats, intimidation, force and violence at the station grounds, yards and right of way of said railroad companies, respectively, in the State of Illinois, to prevent said railroad companies from employing other persons to fill the vacancies aforesaid; to compel other still employés of said railroad companies to quit such employment and to refuse to perform the duties of their service, and to prevent the persons remaining in such service and ready and willing to perform the duties of the same from doing so.

Your orator further avers that said defendants, in pursuance of said combination and conspiracy, acting under the direction of said officers and directors of said American Railway Union, did with force and violence at divers times and places within said State of Illinois and elsewhere, stop, obstruct and derail and wreck the engines and trains of said railroad companies, both passenger and freight, then and there engaged in interstate commerce and in transporting United States mails, by locking the switches of the railroad of said railroad companies, by removing the spikes and rails from the track thereof, by turning switches and displacing and destroying signals, by assaulting and interfering with and disabling the switchmen and other employés of said railroad companies having charge of the signals, switches and tracks of said companies, and the movement of trains thereon, and in other manners by force and violence depriving the employés of said railroad companies in charge of such trains of the control and management of the same, and by these and other unlawful means attempted to obtain and exercise absolute control and domination over the entire operations of said railroads.

And your orator further avers that there is located at the city of Chicago a business and industry conducted under the name of the Union stock yards, at which has been for many years last past received immense numbers of live stock from States and Territories beyond the State of Illinois, which live stock is slaughtered and converted into food products at said stock yards and from them the same is distributed to all quarters of the globe, and that all the large centers of population in the United States are largely dependent upon said Union stock yards for their supply of food products of that character. That for the purpose of handling the live stock

so received at said Union stock yards, and the product thereof, the company conducting said business and industry being the Union Stock Yard and Transit Company also operates certain railroad tracks through the instrumentality of employés engaged in that service. That in pursuance of the aforesaid unlawful combination and conspiracy for the purpose of restraining and interfering with the trade in said live stock and food products among the States, the said defendants Debs, Keliher, Rogers and Howard, on or about the 29th day of June, 1894, issued or caused to be issued orders, directions and instructions to the said employés of the said company operating said Union stock yards, to refuse to further perform the service necessary to the handling, receipt and distribution by means of the railroad tracks so operated by said company, of said live stock and products, among the States.

Your orator further alleges that by reason of said orders, directions and instructions so by said defendants issued or caused to be issued to the employés operating said Union stock yards, the said employés then and there, and but for said order being willing to continue to perform such service, ceased and discontinued the performance thereof, with the result that the business of the company operating said Union stock yards and so heretofore handling
6 and receiving live stock from points outside and beyond the State of Illinois, and converting same into food products and distributing same as above stated, was then and thereafter wholly unable to further continue and transact said business, so that farmers throughout the different States, producing such live stock and theretofore having a market in the city of Chicago were and are deprived of such market, and the persons and consumers theretofore dealing in, and consumers theretofore using the food products manufactured from said live stock, throughout the different States of the Union, were and are also deprived thereof.

And your orator further alleges that in pursuance of the like combination and unlawful conspiracy, the said defendants and others combining and conspiring with them for the purpose of still further restraining and preventing the conduct of such business, have by menaces, threats and intimidation, prevented the employment of other persons to take the place of the employés quit-ing the service of said company so operating said Union stock yards.

And your orator further charges that by reason of said unlawful combination and conspiracy and the acts and doings aforesaid thereunder, the supply of coal and fuel for consumption throughout the different States of the Union and of grain, breadstuffs, vegetables, fruits, meats and other necessaries of life, has been cut off, interrupted and interfered with, and the market therefor made largely unavailable and dealers in all of said various products and the consumers thereof have been greatly injured and trade and commerce therein among the States has been restrained, obstructed and largely destroyed.

And your orator further shows that the said defendants, Debs, Howard, Keliher and Rogers and other officers of said American Railway Union and others whose names are to your orator un-

known, threaten, declare, publish and announce that they will continue in their said illegal acts and doings and will still further restrain, obstruct and interfere with transportation, trade and commerce among the States as hereinbefore set forth.

And your orator further avers that the said defendants, Debs, Howard, Keliher and Rogers threaten, declare, publish and announce, as officers of said American Railway Union, that they will cause the employés in other lines of service of railway companies to quit the service of said railway companies in furtherance of said unlawful combination and conspiracy and also to cause the employés of other railway companies and receivers in the United States, other than those hereinbefore mentioned, to quit the service of said companies and receivers, and also to cause the employés of other individuals and corporations, engaged otherwise than in railway business of carrying on the traffic and commerce among the States, to leave the service of such individuals or corporations, and all in furtherance and in pursuance of the unlawful combination and conspiracy hereinbefore set forth.

And your orator further charges that the said defendants, Debs, Howard, Keliher and Rogers threaten, announce, publish and declare that they can and will, if necessary to carry out the said unlawful combination and conspiracy above set forth, tie up and paralyze the operations of every railway in the United States, and the business and industries dependent thereon.

And your orator further avers that unless restrained by the order and decree of this honorable court, the said defendants will continue their said unlawful acts and doings as above stated and will forthwith carry out their said threats and avowed purposes and intentions.

Forasmuch, therefore, as your orator is without relief in the premises save in a court of equity, and to the end that said defendants and each of them may be ordered to well, true and perfect answer make to all and singular the allegations of this bill but not under oath, their answer and the answer of each of them under oath being hereby waived, may it please your honors to grant unto your orator an injunction and the writ of injunction directed to the defendants, Eugene V. Debs, George W. Howard, Sylvester Keliher and L. W. Rogers and The American Railway Union, Lloyd Hodtchkins, A. Parzybok, H. Elfine, James Hannan, John Mastenbrook, William Smith, Edward O'Neil, Charles Nailer, John Duffy and William McMullen, E. Shelly, Fred. Ketchum, and John W. Doyle, and to all other persons whose names are to your orator unknown, combining and conspiring with them, and to all other persons whomsoever, commanding and enjoining them absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following-named railroads, to wit:

Atchison, Topeka & Santa Fé railroad,
Baltimore & Ohio railroad,
Chicago & Alton railroad,
Chicago & Eastern Illinois railroad,

Chicago & Erie railroad,
Chicago & Grand Trunk railway,
Chicago & North-western railway,
Chicago & Western Indiana railroad,
Chicago, Burlington & Quincy railroad,
Chicago Great Western railway,
Chicago, Milwaukee & St. Paul railway,
Chicago, Rock Island & Pacific railway,
Cleveland, Cincinnati, Chicago & St. Louis railway,
Illinois Central railroad,
7 Lake Shore & Michigan Southern railway,
Louisville, New Albany & Chicago railway,
Michigan Central railroad,
New York, Chicago & St. Louis railroad,
Pennsylvania Company,
Wisconsin Central lines,
Wabash railroad,
Union Stock Yards & Transit Company,

as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the States; and from in any manner interfering with, hindering, or stopping any train carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the States; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or used for the purposes of, or in connection with, interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the States; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the States, or for the purpose of interfering with, injuring or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the States; and from injuring or destroying any part of the tracks, road-bed or road, or permanent structures of said railroads, and from injuring, destroying or in any way interfering with any of the signals or switches of any of said railroads, and from throwing or displacing any of the switches of any of said railroads; and from displacing or extinguishing any of the signals of any of said railroads; and from spiking, locking or in any manner fastening any of the switches of any of said railroads; and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines or parts of trains of any of said railroads engaged

in interstate commerce or in the transportation of passengers or freight between or among the States; or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasion, force or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force or violence, any of the employés of any of said railroads who are employed by such railroads, and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the States, to leave the service of such railroads and from preventing any persons whatever, by threats, intimidation, force or violence from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States. And from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

And that your orator may have such other and further relief in the premises as the circumstances may require and to your honors may seem meet.

And may it please your honors to grant the writ of subpœna directed to said Eugene V. Debs, George W. Howard, Sylvester Keliher, L. W. Rogers, American Railway Union and Lloyd Hodtchkins, A. Parzybok, H. Elfine, James Hannan, John Mastenbrook, William Smith, Edward O'Neil, Charles Nailer, John Duffy and William McMullen, E. Shelly, Fred. Ketchum, John W. Doyle, commanding them to appear before this honorable court on a day certain to be fixed by the court, and then and there stand to and abide by such order, judgment and decree herein as to your honors shall seem fit and proper; and as in duty bound your orator will ever pray.

STATE OF ILLINOIS, }
County of Cook, } ss:

George Q. Allen, being first duly sworn, on oath does state that he has read the foregoing bill and knows the contents thereof, and that he verily believes the statements therein contained are true.

GEORGE Q. ALLEN.

Subscribed and sworn to before me this 2d day of July, 1894.

S. W. BURNHAM,
Clerk U. S. Circuit Court for the Nor. Dist. of Illinois.

(Endorsed:) Filed July 2, 1894. S. W. Burnham, clerk.

8 On the same day, to wit, the second day of July, in the July term of said court, 1894, in the record of proceedings thereof in said entitled cause, before the Hon. William A. Woods, circuit judge, and Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the Circuit Court Thereof.

THE UNITED STATES OF AMERICA, Complainant, } In Equity. Bill
vs. } for Injunction.
EUGENE V. DEBS *et al.*, Defendants. }

And now on this day this cause coming on to be heard on the motion of complainant for a preliminary restraining order or injunction, as prayed in said bill, and complainant having exhibited its sworn bill to the Honorable William A. Woods, circuit justice, and Peter S. Grosscup, district judge, and the court now being fully advised in the premises and having heard read said bill, it is ordered that a writ of injunction issue out of and under the seal of this court commanding the said defendants, Eugene V. Debs, George W. Howard and L. W. Rogers and The American Railway Union, Sylvester Keliher, Lloyd Hodtchkins, A. Pazybok, H. Eltine, James Hannan, John Mastenbrook, William Smith, Edward O'Neil, Charles Nailer, John Duffy, William McMullen, E. Shelly, Fred. Ketchum, John W. Doyle, and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following-named railroads, to wit:

Atchison, Topeka & Santa Fé railroad,
Baltimore & Ohio railroad,
Chicago & Alton railroad,
Chicago & Eastern Illinois railroad,
Chicago & Erie railroad,
Chicago & Grand Trunk railway,
Chicago & North-western railway,
Chicago and Western Indiana railroad,
Chicago, Burlington & Quincy railroad,
Chicago Great Western railway,
Chicago, Milwaukee & St. Paul railway,
Chicago, Rock Island & Pacific railway,
Cleveland, Cincinnati, Chicago & St. Louis railway,

Illinois Central railroad,
Lake Shore & Michigan Southern railway,
Louisville, New Albany & Chicago railway,
Michigan Central railroad,
New York, Chicago & St. Louis railroad,
Pennsylvania Company,
Wisconsin Central lines,
Wabash railroad,
Union Stock Yard & Transit Company,

as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the States; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the States; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with, interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the States; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the States, or for the purpose of interfering with, injuring or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or
9 property between or among the States; and from injuring or destroying any part of the tracks, road-bed or road, or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads; and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the States, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force or violence, any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or

among the States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force or violence any of the employés of any said railroads who are employed by such railroads, and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the States, to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force or violence from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the States; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the States; and from ordering, directing, aiding, assisting or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpœna herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpœna upon any of said defendants named herein shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction.

WM. A. WOODS.
P. S. GROSSCUP.

10 And on the same day, to wit, the second day of July, A. D. 1894, a writ of subpœna issued out of said clerk's office against said defendants in said above entitled cause; which said writ, with the memorandum attached thereto and the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

The United States of America to Eugene V. Debs, George W. Howard, Sylvester Keliher, L. W. Rogers, American Railway Union and Myron Lloyd Hodtchkins, A. Pazybok, H. Elfine, James Hannan, John Masterbrook, William Smith, Edward O'Neil, Charles Nailer, John Duffy, and William McMullen, E. Shelly, Fred. Ketchum, John W. Doyle, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in the northern division of said district, on the first Monday in the month of August next, to answer the bill of complaint of the United States of America, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the
11 United States of America, at Chicago aforesaid, this 2nd day of July, in the year of our Lord one thousand eight hun-
[SEAL.] dred and ninety-four, and of our Independence the 118th year.

S. W. BURNHAM, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

S. W. BURNHAM, *Clerk.*

Marshal's Return.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

I have served this writ upon L. W. Rogers, Eugene V. Debs, and George W. Howard on the 3rd day of July, A. D. 1894; also upon Sylvester Keliher on the 4th day of July, A. D. 1894; also upon A. Pazybok, H. Elfine, James Hannan, John Masterbrook, and William Smith on the 6th day of July, A. D. 1894, by delivering to each of them a true copy of the same on the aforesaid days; also upon the American Railway Union by delivering a true copy of the same to Eugene V. Debs, president of the American Railway Union,

on the 4th day of July, A. D. 1894. The other defendants are not found in my district.

J. W. ARNOLD,
U. S. Marshal.
GEO. N. JONES, *Deputy.*

(Endorsed:) Filed Aug. 2, 1894. S. W. Burnham, clerk.

12 And on the same day, to wit, the second day of July, A. D. 1894, a writ of injunction issued out of said clerk's office in said above-entitled cause; which said writ, with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Injunction.

Circuit Court of the United States of America.

NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

The United States of America to Eugene V. Debs, George W. Howard and L. W. Rogers, and the American Railway Union, Sylvester Keliher, Lloyd Hodtchkins, A. Pazybok, H. Elfine, James Hannan, John Masterbrook, William Smith, Edward O'Neil, Charles Nailor, John Duffy, William McMullen, E. Shelly, Fred. Ketchum, John W. Doyle, and to all other persons combining and conspiring with them and to all other persons whomsoever and to your counselors, attorneys, solicitors, trustees, agents, clerks, employés, servants, and workmen and to each and every of you, Greeting:

Whereas it hath been represented to the judges of our circuit court of the United States for the northern division of the northern district of Illinois, in chancery sitting, on the part of The United States of America, complainant, in a certain bill of complaint exhibited in our said circuit court, on the chancery side thereof, before the judges of said court, against you, the said Eugene V. Debs, George W. Howard and L. W. Rogers, and the American Railway Union, Sylvester Keliher, Lloyd Hotchkins, A. Pazybok, H. Elfine, James Hannan, John Masterbrook, William Smith, Edward O'Neil,
Charles Nailor, John Duffy, William McMullen, E. Shelby,
13 & 14 Fred. Ketchum, John W. Doyle, and to all other persons combining and conspiring with them and all other persons whomsoever, to be relieved touching the matters complained of, in which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience;

And it being ordered that a writ of injunction issue out of said court upon said bill, enjoining and restraining you and each of you as prayed for in said bill: We therefore, in consideration thereof and of the particular matters in said bill set forth, do strictly com-

mand you, the said defendants above named and described, your counselors, attorneys, solicitors, trustees, agents, clerks, employés, servants, and workmen, and each and every of you, that you are hereby restrained, commanded, and enjoined absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing, or stopping any of the business of any of the following-named railroads, to wit:

Atchison, Topeka & Santa Fé railroad,
Baltimore & Ohio railroad,
Chicago & Alton railroad,
Chicago and Eastern Illinois railroad,
Chicago & Erie railroad,
Chicago & Grand Trunk railway,
Chicago & North Western railway,
Chicago & Western Indiana railroad,
Chicago, Burlington & Quincy railroad,
Chicago Great Western railway,
Chicago, Milwaukee & St. Paul railway,
Chicago, Rock Island & Pacific railway,
Cleveland, Cincinnati, Chicago & St. Louis railway,
Illinois Central railroad,
Lake Shore & Michigan Southern railway,
Louisville, New Albany & Chicago railway,
Michigan Central railroad,
New York, Chicago & St. Louis railroad,
Pennsylvania Company,
Wisconsin Central lines,
Wabash railroad,
Union Stock Yards & Transit Company,

as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce or carrying passengers or freight between or among the States, and from in any manner interfering with, hindering, or stopping any train carrying the mail, and from in any manner interfering with, hindering, obstructing, or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce or in connection with the carriage of passengers or freight between or among the States, and from in any manner interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purposes of or in connection with interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the States, and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce or in the transportation of passengers or freight between or among the States or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate com-

merce or the transportation of passengers or property between or among the States, and from injuring or destroying any part of the tracks, road-bed, or road or permanent structures of said railroads, and from injuring, destroying, or in any way interfering with any of the signals or switches of any of said railroads, and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads or any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the States or engaged in carrying any of the mails of the United States, and from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasion, force, or violence any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads or the transportation of passengers or property between or among the States, and from compelling, inducing, or attempting to compel or induce by threats, intimidation, force, or violence any of the employés of any of said railroads who are employed by such railroads and engaged in its service in the conduct of
17 interstate business or in the operation of any of its trains carrying the mail of the United States or doing interstate business or the transportation of passengers and freight between and among the States to leave the service of such railroads, and from preventing any persons whatever by threats, intimidation, force, or violence from entering the service of any of said railroad and doing the work thereof in the carrying of the mails of the United States or the transportation of passengers and freight between or among the States.

And from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads and of transportation of persons and freight between and among the States, and from ordering, directing, aiding, assisting, or abetting in any manner whatever any person or persons to commit any or either of the acts aforesaid.

And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the serv-ce upon them respectively of the writ of subpœna herein, and shall be binding upon said defendants whose names are alleged to be unknown from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpœna upon any of said defendants named herein shall be binding upon said defendants

and upon all other persons whatsoever who are not named
18 herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction.

WM. A. WOODS.
P. S. GROSSCUP.

until this honorable court, in chancery sitting, shall make other order to the contrary.

Hereof fail not under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute and return in due form of law.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at
[SEAL.] Chicago, in said district, this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the 118th year.

S. W. BURNHAM, *Clerk.*

Marshal's Return.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

I have served this writ upon L. W. Rogers on the 3rd day of July, A. D. 1894; also upon Eugene V. Debs, George W. Howard, and Sylvester Keliher on the 4th day of July, A. D. 1894; also upon A. Pazybok, H. Elfine, James Hannan, John Masterbrook, and William Smith on the 6th day of July, A. D. 1894, be personally delivering to each of them a true copy of the same of the aforesaid days; also upon the American Railway Union by delivering a true copy of the same to Eugene V. Debs, president of the American Railway Union, on the 4th day of July, A. D. 1894. The
19–314 other defendants are not found in my district.

J. W. ARNOLD,
U. S. Marshal.
GEO. N. JONES, *Deputy.*

Fees.

10 services	$20 00
15 miles	90
	$20 90

(Endorsed:) Filed Aug. 2, 1894. S. W. Burnham, clerk.

315 On the same day, to wit, the fourteenth day of December, in the adjourned October term of said court, 1894, in the record of proceedings thereof in said entitled cause, before the Hon. William A. Woods, circuit judge, appears the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
EUGENE V. DEBS *et al.* } In Chancery.

In re proceedings for contempt.

Come the parties, by their attorneys, and the respondents Eugene V. Debs, George W. Howard, Sylvester Keliher, Louis W. Rogers, William E. Burns, John F. McVean, James Hogan, and Martin J. Elliott in their own proper persons, and the respondent Roy M. Goodwin by his attorney, and this cause having, on the 28th day of September, A. D. 1894, been by the court taken under advisement, and the court being now fully advised in the premises, it is now considered that said respondents, except John F. McVean, are guilty of contempt in disobeying the mandates of an injunction issued herein on the 2nd day of July, A. D. 1894. It is therefore adjudged and decreed by the court that the said respondent, Eugene V. Debs, be confined and imprisoned in the county jail of Cook county, Illinois, for and during a period of six months, and that the respondents George W. Howard, Sylvester Keliher, Louis W. Rogers, William E. Burns, James Hogan, Martin J. Elliott, and Roy M. Goodwin be confined and imprisoned in the county jail of Cook county, Illinois, for and during a period of three months.

316 It is further ordered by the court that execution of the sentence of imprisonment in this cause as to the respondents sentenced commence ten days from this date. In respect to the respondent John F. McVean, this matter is, by the court, taken under further advisement.

Afterwards, to wit, on the twenty-fourth day of December, in the December term of said court, 1894, in the record of proceedings thereof in said entitled cause, before the Hon. William A. Woods, circuit judge, appears the following entry, to wit:

UNITED STATES OF AMERICA
vs.
EUGENE V. DEBS *et al.* } In Chancery.

Come the parties, by their attorneys, and the defendants Eugene V. Debs, George W. Howard, Sylvester Keliher, Louis W. Rogers, William E. Burns, James Hogan, Roy M. Goodwin, and Martin J. Elliott in their own proper persons, and on their motion it is ordered by the court that the sentence of imprisonment heretofore, on the 14th day of December, A. D. 1894, pronounced upon the defendants herein be, and the same is hereby, modified so that the said sentence of imprisonment in this cause as to all the respondents sentenced commence on the 8th day of January, A. D. 1895.

317 And afterwards, to wit, on the seventeenth day of July, A. D. 1894, came the United States, by Thomas E. Milchrist, United States district attorney for the northern district of Illinois, and filed in the clerk's office of said court its information for attachment: which said information for attachment is in the words and figures following, to wit:

317½ In the Circuit Court of the United States, Northern District of Illinois.

UNITED STATES OF AMERICA, Complainant,
vs.
EUGENE V. DEBS, GEORGE W. HOWARD, L. W. RODGERS, SYLVESTER KELIHER, The American Railway Union, *et al.*, Defendants.

To the honorable the circuit judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

And now comes the United States of America, by Thomas E. Milchrist, United States district attorney for the northern district of Illinois, and informs the court that on the 2d day of July, A. D. 1894, the United States of America caused to be filed in the office of the clerk of said court for said district, its certain information or complaint, charging, among other things, that the above-named defendants were then and there engaged in a confederacy or conspiracy to unlawfully interfere with and prevent the transportation of the United States mails and interstate commerce over and upon the lines of the said several railways or railroads therein named, and praying for relief, for the causes therein set forth:

That on said day, after due consideration by said court, a writ of injunction was duly issued by order of said court [reciting same].

The court is further informed that said American Railway Union is a voluntary association, of which many thousand railway employés were, at the time of the filing of said bill, and still are members; that the said defendant, Eugene V. Debs, is the president of said association, George R. Howard, its vice-president, Sylvester Keliher, secretary and treasurer, L. W. Rodgers, one of the directors, and that all of said defendants were and are directors of the said American Railway Union; that the avowed purpose and object of said American Railway Union, and the officers thereof, were, at the time of the filing of the said bill, and still are, to procure all the employés of the several railways within the United States to become members of said American Railway Union, and to concentrate the power and jurisdiction of said American Railway Union, and all the members thereof, under one official control, management and direction, with power to order strikes or a discontinuance of the service of such employés with either or any of the railway companies of the United States, at any time that said American Railway Union, its board of directors, or other officers should elect so to do, with or without sufficient cause; that prior to the filing of said

bill and the issuing of said writ of injunction, said American Railway Union, or its board of directors or other officers, including the above-named defendants, to wit: on the 26th or 27th day of June last past, had directed and ordered all the members of said American Railway Union engaged in the service of the Illinois Central Railroad Company in the transportation of the United States mails and of interstate commerce and all other trains controlled, managed and operated by said company upon its line of road, to strike or leave the services of said company; that thereafter, and before said writ of injunction was issued, similar orders were issued to the employés of certain other railway companies, named in the said bill of complaint, and that in pursuance of said orders, all of said employés who were members of said American Railway Union did in a body leave the service of said railway companies for the avowed and express purpose of hindering, preventing and delaying said railway companies in the operation of trains engaged in the transportation of the United States mails and interstate commerce over the respective roads of said companies.

The court is further informed that said order or writ of injunction was published in the daily papers of the city of Chicago on the morning of July the 3d, 1894, and that each and all of the above-named defendants had knowledge that said order or writ of injunction had been duly entered in said cause; that a copy thereof was served upon the defendant Rodgers on the 3d day of July instant, and upon the defendant Eugene V. Debs early on the morning of July 4th, and upon the defendants George W. Howard and Sylvester Keliher on the said 4th day of July, 1894; that return of said service was duly endorsed thereon by the United States marshal for said district, to which the court is referred for greater certainty.

318–320 The court is further informed that said American Railway Union, prior to the said 2d day of July, had organized many local unions upon substantially all the railroads located in the Northwest, and extending from the city of Chicago westward to California, including substantially all the railroads to the Pacific coast, and at the same time was engaged in organizing local unions upon all the main lines of road extending from the said city of Chicago to the Atlantic coast, and that such work of organization and extension was continued, without change or interruption, after the service of said writ of injunction upon all of said lines, for the express and avowed purpose of conferring upon said railway union power and authority to order strikes upon all of said roads, as rapidly as said local unions could be organized; that the orders for strikes and for the railway employés to leave in a body the service of the several railroads named in the said bill of complaint, as well as other railroads, were generally communicated by telegram from the defendant Debs, to the officers or committees of local unions at the most important railway centers and cities. Copies of some of such telegrams and orders so issued by the defendant Debs, both before and after the service of said writ of injunction, are herein inserted, for the purpose of showing that the service of said writ

and order of this honorable court did not affect or change the policy or conduct of the said defendant relative to said strikes, but, on the contrary, that said defendants continued, notwithstanding the order of said court, and in direct and open violation thereof, to order the employés of the railway companies named in said writ of injunction, as well as other railway companies, to leave the service of the said companies in a body, and thereby hinder, delay and prevent said railway companies in the discharge of their duty to the public, and especially in the discharge of their duties as agents of the government in the transportation of the United States mails, as well as in the transportation and carriage of interstate commerce.

[Here follow said telegrams.]

321 The court is further informed that said telegrams and hundreds of other telegrams, similar in form and character, were sent by the defendant Debs (with the knowledge, authority and approval of each and all of the other of said defendants, as well as 322 other directors of said American Railway Union), after the service of said writ of injunction upon said defendants; and that in pursuance of said orders and directions, many of the employés of the several railways named in said writ of injunction were induced to leave the service of said railway companies, and so-called railway strikes prevailed generally upon the lines of several of said railway companies, and the transportation of the United States mails and interstate commerce was thereby and by reason thereof greatly hindered, delayed and prevented, and upon some of said lines for several days.

The court is further informed that as a direct result of said order for said strikes upon some of said lines—notably upon the said Illinois Central railroad, the Chicago, Rock Island and Pacific, the Chicago, Burlington and Quincy, the Chicago and Alton, the Chicago and Western Indiana, and upon the Pennsylvania Company's lines—there was exercised upon the part of many of the strikers or ex-employés of the said several railway companies intimidation and open violence; that employés of said railway companies who refused to join in the said strike and act in concert with said strikers, and others who had been employed by said railway companies to take the place of said strikers and were in the actual service of said companies, were assaulted and intimidated by the strikers and driven from their post of duty, either by physical violence or threats of personal injury; that during the fifth, sixth and seventh days of July last past said strikers, and others acting in sympathy with them, took forcible possession of some of the roads of said companies within and adjacent to the city of Chicago, and by physical force prevented the passage of trains carrying United States mail and interstate commerce; that engines and trains of cars were derailed and passenger trains were assaulted with stones and other missiles, as well as the employés in charge of such trains, and in some instances both the passenger cars and engines were fired upon, thereby endangering the lives not only of the employés

of the several companies, but of the passengers upon the said trains. These mobs were in many instances led by the strikers or ex-employés of the several railway companies, who had gone out of service upon the orders of these said defendants as officers of the said American Railway Union; and mobs composed of strikers and others were massed at different points upon the different lines of roads within and adjacent to the city of Chicago in such numbers as to be beyond the control of the Government, State and municipal authorities. At least one thousand freight cars belonging to said several railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. Signal towers and other appurtenances of said railway were also destroyed by fire. Employés of the railroad companies who refused to obey the orders of the said defendants and other officers of the said American Railway Union and remained faithful to the discharge of their duty were violently assaulted, beaten and bruised, and in some instances were forcibly arrested and taken from their engines and kept in confinement for several hours. Many lives were also sacrificed—all of which was a direct result of the numerous strikes ordered as aforesaid.

And the court is further respectfully informed that the said defendants had full knowledge that many of such violent acts upon the part of the strikers or ex-employés of the railroads were perpetrated prior to the service of said writ of injunction, and notwithstanding such knowledge and the further knowledge that violence invariably follows all strikes of a similar character, said defendants, in willful violation of the order of said court, daily and continuously, after the service of said writ of injunction issued their orders and directions for the employés of said railways to leave such service in a body, and also continued such orders while the said mobs were in partial possession of said railroads, and engaged in forcible resistance of the orders of this court and its officers.

And the complainant further informs the court that it is informed and verily believes that the aforesaid strikes were not ordered on account of any wrongful act of said railroad companies, or of their officers, toward the members of said American Railway Union, or other employés of said railroad companies, or either of them, but on the contrary, the avowed purpose of said orders for strikes, by the directors of said railway union, including the aforesaid named defendants, was to wrongfully and unlawfully establish a boycott against the so-called Pullman sleeping cars, which said sleeping cars were used in great numbers by said railroad companies in trains carrying the United States mail, and passengers traveling at great distances from State to State, and through the several States, and to make said boycott effectual, said directors of said American Railway Union, including said defendants, ordered that no trains of cars of any kind or character should pass over the tracks of either of said railroad companies within and adjacent to the city of Chicago, until the use of said boycotted cars had been abandoned by all of said railroad companies.

The complainant further informs the court that the board of di-

rectors of said American Railway Union, including said defendants, and its authorized agents, assume the authority and power, and as complainant believes, have full authority and power to order strikes and boycotts, and to discontinue the same, under the rules of said American Railway Union, and that such assumed power and authority is clearly shown by the statements and admissions made by the said defendant Debs, as president, Howard, as vice-president, and Keliher, as secretary of the American Railway Union, in a communication signed by them, and addressed to the railway managers, on the 12th of July, instant, of which the following is a copy, to wit:

[Here follows copy.]

323 The authority exercised over the members of said American Railway Union, by its board of directors, and the said Eugene V. Debs as its president, relative to the movement of trains upon and over said railways, is shown by an order issued on the second day of July, A. D. 1894, of which the following is a copy, to wit:

[Here follows copy.]

At the time said order was issued, there were many dead and decaying animals at the stock yards and elsewhere, imperiling public health. The striking employés refused to permit the removal of such animals by rail without the order of the president of the American Railway Union, and, accordingly, in the interest of public health, as stated in such order, and upon application of the proper officials of the city of Chicago, said order was issued, permitting the removal of such dead animals.

The following report of an interview with the defendant Debs was published in the Chicago Herald of July 15th:

[Here follows interview.]

It therefore appears that the aforesaid defendants are in contempt, for the willful and repeated violation of said injunction, as hereinbefore brought to the knowledge of this court, and that the said Eugene V. Debs threatens to continue so doing, and to increase the membership of said American Railway Union by forming local unions at other and different places on the roads of the companies hereinbefore named, and also threatens that as soon as such unions have been formed he will immediately order all the members thereof to strike and leave the service of said companies, or either of them, and thereby to make the boycott of said cars more effectual, will interfere with, hinder and delay the movement of all trains upon the lines of said railways.

Wherefore, the complainant respectfully requests the court
324 that in consideration of the breaches of said injunction by the aforesaid defendants, it will issue a writ of attachment against said defendants, the said Eugene V. Debs, George W. Howard, Sylvester Keliher and L. W. Rodgers, and that they may be held

to answer for said contempt, and that justice may be done in the premises.

UNITED STATES OF AMERICA,
By THOMAS E. MILCHRIST,
Their Attorney.

EDWIN WALKER,
Special Counsel.

STATE OF ILLINOIS, }
Cook County, } *ss:*

Thomas E. Milchrist, being duly sworn, deposes and swears that he is United States attorney for the northern district of Illinois; that he has read the foregoing information, and knows the contents thereof, and that the same is true in substance and fact, as he verily believes.

THOMAS E. MILCHRIST.

Subscribed and sworn to before me this — day of July, A. D. 1894.

— —.

325–327 Afterwards, on the twenty-fourth day of July, in the July term of said court, 1894, in the record of proceedings thereof in said entitled cause, before the Hon. William A. Woods, circuit judge, and the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

UNITED STATES OF AMERICA }
vs. } In Chancery.
EUGENE V. DEBS *et al.* }

Now again come the parties by their attorneys. The court, after hearing the arguments of counsel in conclusion and now being fully advised in the premises, overrules the motion of defendants to dismiss the information herein.

328 In the Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, Complainant, }
vs. }
EUGENE V. DEBS, GEORGE W. HOWARD, L. W. ROGERS, SYLVESTER KELIHER, *et al.*, Defendants. }

Now comes the said defendants and first saving and reserving unto themselves all and singular the advantage that may to them accrue by reason of the many and manifold insufficiencies in the bill of the complainant herein and the injunction issued thereon by reason whereof the defendants say, as they are advised, that the said injunction is in all things wholly void and without effect, they jointly and severally make answer to the information of the said

complainant, and in that regard do respectfully show to the court as follows:

They admit that on the second day of July, 1894, the United States of America caused to be filed in the office of the clerk of said court for said district a certain complaint or bill in equity, and allege that said complaint or bill, together with the affidavit verifying the same, was and is in the words and figures following, to wit:

329 They admit that on said day a certain writ of injunction was issued by the order of said court upon said bill, and that a copy of the order of the said court directing that such writ of injunction be issued is attached to the complainant's information herein.

They admit that the American Railway Union is a voluntary association, of which many thousands employés were at the time of filing said bill and still are members; that the defendant Eugene V. Debs is president of said association and George R. Howard vice-president, Sylvester Keliher secretary and treasurer, and L. W. Rogers one of the directors, and that all of said defendants were and are directors of said American Railway Union. They allege that the purpose of said American Railway Union and the purpose and intent of the organization and maintenance thereof was the protection of all its members in their rights and interests as employés of the various railway systems of the United States and to procure by all lawful and legitimate means fair, reasonable, and adequate compensation for all its said members for the service performed by them; that membership in said American Railway Union was open to every employé of good personal character and reputation engaged upon the railway systems of the United States, and that to better secure and effectuate the purpose and objects of said American Railway Union, as hereinbefore set forth, it was the desire and one of the purposes of the said American Railway Union to procure all such persons to become members of such organization.

They deny that it was at any time the purpose and object of said American Railway Union or of the officers or directors thereof or of these defendants or either or any of them to concentrate the power and jurisdiction of said American Railway Union under one official management and direction, with power to order strikes
330 or a discontinuance of the service of such employés at any time that the board of directors or the American Railway Union should elect so to do, as alleged in said information, or otherwise, and they allege that by the organization of the said American Railway Union strikes could only be declared or discontinued by the vote of a majority of the members of such American Railway Union employed in the service affected by any such strike, and that the only power, authority, or office of the said officers or directors of said American Railway Union or of these defendants or either of them in respect to said matter was to notify the members of said American Railway Union in the service concerned in such strike of the action taken by such majority.

They deny that on the 26th or 27th day of June last past or at

any other time the American Railway Union or its board of directors or other officers or these defendants or either of them had directed and ordered the members of said American Railway Union engaged in the service of the Illinois Central Railroad Company to leave the service of said company as alleged in said information or otherwise, or that at any time any orders were issued to the employés of the railroads mentioned in the complaint or any of them to leave the service of such companies; but they allege that on or about said time a majority of the members of said American Railway Union employed upon said Illinois Central railroad and upon said other companies referred to in said information did for themselves, without any order, direction, or control of the said American Railway Union or of its officers or directors or of these defendants or either of them, voluntarily determine by their votes that
331 they would strike or leave the service of said railway companies, and that in pursuance of such vote said employés did, on or about said time, leave the service of said railway companies freely and voluntarily of their own accord, without any order, direction, or control on the part of said American Railway Union, its officers or directors, or of these defendants or any of them. Upon information and belief the defendants deny that said employés so leaving the service of said railway companies as aforesaid did so for the purpose of hindering, preventing, and delaying said railway companies in the operation of trains engaged in the transportation of the United States mails and interstate commerce over the respective roads of said companies.

Defendants admit that said order or writ of injunction *as* published in the daily papers of the city of Chicago, as alleged in said information, and that copies thereof were served upon the defendants, as in said information alleged.

Defendants admit that prior to the said second day of July many local unions of the said American Railway Union were organized upon railroads located in the Northwest and extending from the city of Chicago westward to California and including substantially all the railroads to the Pacific coast. They admit that the American Railway Union had prior to the second day of July organized many local unions upon railroads in the Northwest, and was engaged in organizing local unions upon the main lines of road extending from the city of Chicago to the Atlantic coast, and admit that after the service of said injunction many persons upon said systems of railways met together and organized themselves into local unions of the said American Railway Union, and duly applied to
332 said American Railway Union for admission to membership therein, and such persons so organizing themselves and so applying were received and admitted as members of said American Railway Union, but deny that after the service of said injunction they or either of them carried on the work of organization other than by generally advising railroad employés to become members of such union and receiving to membership persons so applying therefor as aforesaid. They expressly deny that the organization of said unions upon said roads or any of them was intended to con-

fer or did confer upon said American Railway Union, its officers or directors, or upon these defendants or either of them, the power and authority to order strikes upon said roads as alleged in said information or otherwise; but, on the contrary, allege that strikes could only be ordered upon said roads by the employés of said road- themselves, and that such employés were in no manner subject to the authority or control of said American Railway Union, its officers or directors, or of these defendants or either of them in that regard. They deny that orders to strike were at any time or in any manner communicated by said American Railway Union, its officers or directors, or these defendants or either of them, to said local unions or any of them as alleged in said information or otherwise.

The defendants deny that any one of the telegrams set forth in said information was sent or caused to be sent by them or any of them, or that they authorized or approved the same or any one thereof, except a certain telegram dated July 6, 1894, in the words and figures following:

"We have assurance that within forty-eight hours every labor organization in this country will come to our rescue. The
333 fight is on and our men are acquitting themselves like heroes. Here and there one weakens, but our cause is strengthened by a dozen going in his place. Every true man must quit now and remain out until the fight is won. There can be no half ground. Men must be for us or against us. Our cause is gaining ground daily and our success in only a question of a few days. Don't falter in this hour. Stand erect and proclaim your manhood. Labor must win now or never. Our victory will be positive and complete. Whatever happens do not give credence to rumors and newspaper reports."

Which said telegram, defendants admit, was sent or caused to be sent by the defendant Debs as in said information alleged, but save as hereinbefore admitted defendants allege that they had no knowledge or notice whatever of the sending of said telegrams or of the contents thereof until the filing of said information.

They deny that any other telegrams similar in form and character to those in said information sent out were sent by the defendant Debs or any of the defendants with the knowledge, authority, or approval of any of said other defendants at any time after the service of said writ of injunction upon said defendants, and deny that any employés of any of the railway companies named in said injunction were induced by reason of any telegram sent or caused to be sent by the defendants or any of them by threats, intimidation, force, or violence to leave the service of said railway companies, or that the transportation of the United States mails and interstate commerce were thereby in any way hindered, delayed, or prevented.

The defendants admit that upon some of said lines of railway there was exercised upon the part of some persons, to the de-
334 fendants unknown, violence against persons and property. They deny that they or any of them have any knowledge or information sufficient to form a belief as to the commission of the

specific acts of violence in said information set forth or any thereof, and upon information and belief they deny that any member of said American Railway Union in any manner participated in said acts of violence or any of them.

They deny that, in violation of the order of the court, they daily and continuously or at all issued any order or directions for the employés of said railway companies, or any of them, to leave such service in a body as alleged in said information or otherwise. They deny that at said time or at any time they knew that violence and unlawful conduct necessarily followed from strikes of the kind mentioned in said information, and deny that such is the fact, but, on the contrary, allege that, so far as said American Railway Union or the members thereof are concerned, said strike and all strikes of similar character contemplate nothing more than the quiet, peaceable, and lawful cessation of work by such members when and for such periods as they shall for themselves determine.

Defendants expressly deny that they or any one of them did at the times mentioned in said information, or at any other time, order, direct, counsel, advise, recommend, or approve the acts of violence in said information set forth, or any of them, or any violence or unlawful acts of any kind or character, but, on the contrary, allege that they did at all said times counsel and advise all members of the said American Railway Union with whom they were in communication to at all times *sustain* from violence, threats, and intimidation, and to at all times respect the law and the officers thereof.

335 They deny that the board of directors of said American Railway Union or its officers or these defendants or either of them at any time assumed the authority and power or have now or ever have had any authority or power whatsoever to order strikes and boycotts or to discontinue the same.

They admit that on the 12th day of July, 1894, the communication set out in said information was addressed to the railway managers and signed by the defendants whose names are affixed thereto, but allege that so much of said communication as implies or assumes any right, power, or authority in said defendants or either of them to discontinue said strike was unauthorized, and that said defendants had no other power or authority in said matter than to recommend to the members of the said American Railway Union the adoption of the proposals therein stated.

Defendants admit the sending of the communication to the Pan Handle yardmen set forth in said information, but deny that in and by said communication they exercised or assumed to exercise any power or authority over said men or any thereof, but that said communication was merely a request to said men to perform the acts therein stated.

They deny that they have any knowledge or information sufficient to form a belief *to as* whether the interview set forth in said information was in fact published in the Chicago Herald on July 15th or at any other time. They deny that the defendant Debs or any other defendants caused said interview to be published or

uttered the statements therein contained or any of them, but allege that said interview is wholly false, forged, and fictitious.

The defendants deny that they or either of them have in
336 any way or manner interfered with, hindered, obstructed, or stopped any of the business of the railroads mentioned in said injunction or either of them as common carriers of passengers and freight between or among any States of the United States, or that they or either of them have in any manner interfered with, hindered, obstructed, or stopped any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce or carrying passengers or freight between or among the States, or that they or either of them have in any manner interfered with, hindered, or stopped any train carrying the mail, or that they or either of them have in any manner interfered with, hindered, obstructed, or stopped any engine in interstate commerce or in connection with the carriage of passengers or freight between or among the States, or that they or either of them have in any manner interfered with, injured, or destroyed any of the property of any of said railroads engaged in or for the purpose of or in connection with interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the States, or that they or either of them have entered upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing, or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce or in the transportation of passengers or freight *trains* between or among the States, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the States, or that
337 they or either of them have injured or destroyed any part of the tracks, road-bed, or road or permanent structures of said railroads, or that they or either of them have injured, destroyed, or in any way interfered with any of the signals or switches of any of said railroads, or that they or either of them have displaced or extinguished any of the signals of any of the said railroads, or that they or either of them have spiked, locked, or in any manner fastened any of the switches of said railroads, or that they or either of them have uncoupled or in any way hampered or obstructed the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the States or engaged in carrying any of the mails of the United States, or that they or either of them have compelled or induced or attempted to compel or induce by threats, intimidation, persuasion, force, or violence any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mails by such railroads or the transportation of passengers or property between or among the States, or that they or either of them have compelled

or induced or attempted to compel or induce by threats, intimidation, force, or violence any of the employés of said railroads who are employed by such railroads and engaged in its service in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States or doing interstate business or the transportation of passengers and freight between and among the States to leave the service of such railroads, or that they or either of them have prevented any person whatever by
338 threats, intimidation, force, or violence from entering the service of any of said railroads and doing the work thereof in the carrying of the mails of the United States or the transportation of passengers and freight between or among the States, or that they or either of them have done any act whatever in furtherance of any conspiracy or combination to restrain either of the said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroad and of transportation of persons and freight between and among the States, or that they or either of them ordered, directed, aided, assisted, or abetted in any manner whatever any person or persons to commit any or either of the acts aforesaid.

And the said defendants each for himself does plead to the said information that he is not guilty of any or either or all of the acts therein charged, or of any contempt of the orders of this court in the premises.

Defendants further allege that after the service of said injunction upon them they forthwith consulted competent counsel learned in law and duly authorized and licensed to practice as attorney and counsellor at law in the courts of the United States and fully and fairly stated to him all the facts in the premises and exhibited to him the order of the court made herein, and were advised by him as to what they might rightfully and lawfully do in the premises without violation of the order of the court or contempt of its authority, and that they have since that time in all things proceeded in their acts and conduct in regard to said strike and the persons engaged therein in strict accordance with the advice of the
339 said attorney so by them consulted, and the said defendants each for himself denies that he intended in any way to violate the injunction of this court or to act in defiance or contempt of its authority in any respect.

And the defendants further allege that by the organization of a said American Railway Union and by custom and usage uniformly and universally prevailing therein at all the times in said information mentioned, which said custom and usage had the force and effect of and stood in lieu of by-laws of said American Railway Union, and by the general and unanimous will, consent, delegation, and acquies-ence of all the members thereof, the officers and directors of said American Railway Union, including these defendants, were at all the times in said information mentioned fully authorized, empowered, and directed to act as the agents of the members of said American Railway Union and all of them and all the separate unions thereof whenever a strike or cessation of labor had been determined upon

by said members of said union or either of them, to inform and advise them concerning the condition and prospects thereof and the condition and attitude of the several local unions engaged therein, and to advise and counsel them as to the peaceful and lawful methods pursued by them to secure the redress of grievances complained of by them, and to treat and negotiate for them, but subject to their ultimate ratification, with their employers for a settlement or adjustment of the causes leading to said strike, but had no right, power, or authority to in any way order or command any of said members in respect to any of said matters; and they allege that each and every act and thing done by them in reference to the strike in said information mentioned or any of the persons engaged therein
340 was done in pursuance of such power and authority and not otherwise.

Wherefore defendants pray that they may be adjudged not guilty of contempt; that the complainant's information be as to them dismissed and they go hence without day.

——— ———.

STATE OF ILLINOIS, }
County of Cook, } *ss.*:

Eugene V. Debs, George W. Howard, Sylvester Keliher, and L. W. Rogers, being duly sworn, each for himself, on oath doth say that he has heard read the foregoing answer, and that the same is true of his own knowledge as therein set forth save as to the matters therein stated to be on information and belief, and as to such matters that he believes it to be true.

——— ———.

Subscribed and sworn to before me this 23rd day of July, A. D. 1894.

——— ———,
Notary Public.

341 United States Circuit Court, Northern District of Illinois.

UNITED STATES, Complainant, }
vs.
EUGENE V. DEBS *et al.*, Defendants. }

For a further and supplemental answer to the information of the complainant herein, the defendants deny each and every allegation in said information contained and each and every part thereof save as the same are in their former answer expressly admitted or qualified.

STATE OF ILLINOIS, }
County of Cook, } ss:

Eugene V. Debs, George W. Howard, Sylvester Keliher, and L. W. Rogers, being duly sworn, depose and say that the foregoing supplemental answer is true.

EUGENE V. DEBS.
G. W. HOWARD.
SYLVESTER KELIHER.
L. W. ROGERS.

Subscribed and sworn to before me this 25th day of July, A. D. 1894.

GEO. W. KEMP,
U. S. Com'r, N. D. Ills.

342 An information was presented August 1, 1894, making similar charges against Messrs. Hogan, Burns, Goodwin, McVean, and Elliott; to which information also an answer was filed.

Evidence was taken upon the issues raised by both answers and the cause heard thereon; whereupon judgment was entered December 14, 1894. (*Ante*, pp. 21, 22.)